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# In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GRETNA, LOUISIANA, et al.,
Petitioner

VERSUS

CITIZENS FOR A BETTER GRETNA, et al.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

(1) Does *Thornburg v. Gingles* establish threshold criteria for a claim of vote dilution under Section 2 of the Voting Rights Act, including a finding of a pattern of "usual loss"?

(2) Is it permissible for the circuit court to require that a "black preferred candidate" be a member of the black race?

(3) May the circuit court interpret the Voting Rights Act so that candidates of the white race, who out-poll candidates of the black race among black voters, are denied the status of "black preferred" candidacy, merely on the grounds that they are white?

(4) May the circuit court interpret the Voting Rights Act so that candidates of the black race who do not garner appreciable amounts of the black vote are excluded from the "totality of circumstances" test on the grounds that they are not "viable" candidates?

(5) May the circuit court interpret the Voting Rights Act so that candidates of the white race, who do garner majority support among black voters, are excluded from the "totality of circumstances" test, solely on the grounds that they are white?

(6) May the circuit court interpret the Voting Rights Act, so that entire electoral periods are excluded from consideration under the *Velasquez* doctrine in the determination of vote dilution, merely because all candidates were members of the white race?

(7) May the circuit court interpret the Voting Rights Act, so that elections "exogenous" to the challenged mechanism in vote dilution litigation are of probative value, simply because they have candidates of the black race?

(8) May the circuit court interpret the Voting Rights Act so that elections "exogenous" to the challenged mechanism in vote dilution litigation are of no probative value, simply because they have no candidates of the black race?

(9) May the circuit court interpret the Voting Rights Act, so that it protects candidates rather than voters?

## DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

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Ronnie C. Harris - present Mayor, City of Gretna
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Louis A. LeBoeuf, Jr. - former Alderman, City of Gretna
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## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i
DESIGNATED LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW.....iii
TABLE OF CONTENTS.....iv
TABLE OF AUTHORITIES.....v
OPINIONS BELOW.....1
JURISDICTIONAL STATEMENT.....1
STATUTES INVOLVED.....1
CONCISE STATEMENT OF THE CASE.....2
STATEMENT OF THE CASE.....3
REASONS FOR GRANTING THE PETITION.....19
CONCLUSION.....22
CERTIFICATE OF SERVICE.....24

APPENDIX A
Opinion of the Court of Appeals.....A-1
APPENDIX B
Opinion of the District Court.....A-18

## TABLE OF AUTHORITIES

CASES — Page

*Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987, *cert. denied* 108 S.Ct. 1111 (1988).....18,20

*Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), 636 F.Supp. 1113 (E.D.La. 1986).....*passim*

*Collins v. Norfolk*, 786 F.2d 572 (4th Cir. 1985), *cert. granted* 106 S.Ct. 3326 (1986).....7,16

*East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed. 2d 296 (1976).....4

*League of United Latin American Citizens v. Midland Independent School District*, 812 F.2d 1494 (5th Cir. 1987).....7

*Thornburg v. Gingles*, 106 S.Ct. 2752 (1986).....*passim*

*Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984).....19

*White v. Reqester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed. 2d 314 (1973).....5

*Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).....4

STATUTES

Voting Rights Act, 42 U.S.C. Sec 1973 (Pub. L. 97-205, Sec. 3, June 29, 1982, 96 Stat. 134).....*passim*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 834 F.2d 496 (5th Cir. 1987). The opinion of the District Court (Appendix B) is reported at 636 F.Supp. 1113 (E.D.La. 1986).

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on December 23, 1987, and the denial of the petition for rehearing was entered on June 13, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

## STATUTES INVOLVED

The Voting Rights Act of 1965, Sec. 2, as amended June 29, 1982, 42 U.S.C. Sec. 1973[1] is the only statute that

[1] Hereinafter cited as Voting Rights Act.

is the subject of this petition, and it is discussed in detail in *Thornburg v. Gingles*, 106 S.Ct. 2752 (1986) and the related cases.

## CONCISE STATEMENT OF THE CASE

This case was tried in the Federal District Court for the Eastern District of Louisiana in January and February, 1985. The district court rendered an Opinion on May 12, 1986, finding that the City of Gretna's system of at-large elections for selecting its five aldermen "violates Section 2 of the Voting Rights Act, and that plaintiffs are therefore entitled to appropriate relief. . . "[2] The trial, held sixteen months prior to the Opinion, was conducted absent the guidance of *Thornburg v. Gingles*. The decision, as well, was crafted and delivered without reference to or knowledge of the Supreme Court's findings in that landmark case.[3] Defendants sought a new trial in light of *Thornburg*. Relief was denied.

The circuit court denied the crucial relevance of *Thornburg* to the City of Gretna's defense, disavowing the threshold standards for vote dilution established in that decision. The circuit court advanced a doctrine of attainder by consanguinity, whereby jurisdictions are placed in jeopardy by political behavior outside of their spheres of responsibility, through a unique and inappropriate notion of vicarious liability. The circuit court established a

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[2] *Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113 (E.D.La. 1986) at 1115.

[3] The trial court, inexplicably, informed counsel for defendants, when denying a motion for new trial, that it was "fully cognizant of *Thornburg* when it rendered its Opinion". The contents of the Opinion are not consistent with the trial court's assertion. More significantly, this the district court's Opinion preceded *Thornburg* by a matter of seven (7) weeks. See *Record*, Vol 2, p. 447.

doctrine, whereby candidates of the black race were regarded as "preferred candidates, " even if outpolled among black voters by candidates of the white race.

The decision of the circuit court is contrary to the Voting Rights Act, to its governing interpretation in *Thornburg v. Gingles,* and it is in conflict with jurisprudence in other circuits. The district court's original findings should have been remanded for consideration under *Thornburg.* There is no basis, indeed precedent argues to the contrary, for a finding of vote dilution in a given community premised on exogenous voting patterns in statewide or national contests. There is no basis in the Constitution, in legislation, or in jurisprudence for the determination that the color of a candidate's skin can endow him/her with preferential status contrary to the verdict of the electorate.

## STATEMENT OF THE CASE

### 1. The City of Gretna Was Denied Trial Under The *Thornburg* Burden of Proof Scheme.

The fundamental thrust of *Thornburg* is the delineation of threshold conditions for pressing claims of vote dilution under the *Voting Rights Act.* The threshold conditions require a minority group challenging an electoral mechanism (in this instance an at-large system for electing five city aldermen) to establish that the the minority group is large enough and geographically compact enough to constitute a majority in a single-member district; that the group is politically cohesive; that the majority casts its vote as a bloc thwarting the minority's opportunity to elect candidates of its choice; and that bloc voting is structural (pervasive), not just the outcome of an isolated election. *Thornburg* at 2766-2767.

At trial the City of Gretna was scrutinized through the compound eye of the *Zimmer,* or *Zimmer*-derived factors. The relevant ones at trial were:

(1) Past discrimination and its lingering effects;

(2) Effects of discrimination in facilities, education, employment, and housing;

(3) Voting patterns in municipal elections;

(4) The extent of election of black citizens to public office;

(5) Access to the "slating" process;

(6) Existence of large districts;

(7) Majority vote requirements;

(8) The lack of provision for at-large candidates running from particular geographical sub-districts. *Zimmer v. McKeithen* 485 F.2d 1297 (5th Cir. 1973), *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam).

These factors played a large role in the legislative history of the *Voting Rights Act.* S.Rep. 30, n. 120, U.S. Code Cong. & Admin. News 1982, 206-208. But, as the Supreme Court stated:

"While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority

group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of Sec. 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election." *Thornburg* at 2765-2766.

The threshold features of this passage scaled, or established, a hierarchy among the *Zimmer* factors. In the words of Justice O'Connor:

> "As shaped by the Court today, then, *the basic contours of a vote dilution claim require no reference to most of the "Zimmer factors"* that were developed by the Fifth Circuit to implement *White v. Register's* results test and which were highlighted in the Senate Report. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, *then unless white voters usually support the minority's preferred candidates in sufficient numbers to*

> enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish 'the history of voting-related discrimination in the State or political subdivision,. . . .' " *Id.* at 2788-2789. (*Cit. om.*, emphasis added.)

The circuit court's response to the City of Gretna's plea for a trial in light of the above was to note that "the trial court determined the Sec. 2 violation from factual findings structured along *Zimmer* guidelines." The circuit court then ignored the City of Gretna's verbatim extracts from *Thornburg* and went on to take issue with a position the City of Gretna never took: "We cannot agree that the Supreme Court in *Gingles* made the *Zimmer* analysis obsolete." *Gretna* at 983.[4]

The City of Gretna has no desire to characterize, on its own, the *Zimmer* factors with words such as "obsolete." Instead, petitioners submit that the relevant framework for evaluating a vote dilution claim are the *Thornburg* threshold criteria. Should that threshold be traversed, then the *Zimmer*-factors might be brought to bear, insofar as they may be relevant.

Irrespective of how one might characterize the *Zimmer*-factors' contemporary legal status, the City of Gretna is entitled to a trial, *and a defense,* under *Thornburg v. Gingles* guidelines. There is nothing novel in this; indeed petitioners' position is supported by precedent in directly

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[4] A computer search through electronically stored text of the City of Gretna's *Original Brief on Appeal* reveals that the word "obsolete" never appears.

related litigation. When the City of Norfolk, Virginia's at-large electoral provisions were challenged in a time-frame overlapping *Thornburg v. Gingles,*[5] the Supreme Court granted certiorari; the judgment was vacated and remanded for further consideration under *Thornburg. Collins v. Norfolk,* 106 *S. Ct.* 3326 (1986). In the Fifth Circuit similar remand was ordered in *League of United Latin American Citizens v. Midland Independent School District,* 812 F.2d 1494 (1987).

2. The City of Gretna Was Held To Novel Legal Standards.

Granted that the City of Gretna was neither tried nor judged under *Thornburg* criteria, to what standards was it held? The circuit court maintains that *Zimmer*-factors were employed. This is wide of the mark.

a. Racial Polarization

In respect to what is commonly noted as the linchpin of vote dilution litigation, racial polarization, *Thornburg's* approach is the following:

> "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate's running unopposed. . .usually to defeat the *minority's preferred candidate.*" *Thornburg* p. 2767. (Emphasis added.)

The important portion of this definition is the notion

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[5] Norfolk's litigation began before Gretna's. It is anomalous, and inequitable, to deny Gretna equal protection.

of "preferred candidate." The relevance of race in this passage is linked to the voters. This is only appropriate, since the statute under interpretation here is, after all, the *Voting Rights Act.* The City of Gretna was held to another definition of racial polarization:

> "Although racial polarization is defined as *beginning* where blacks and whites vote differently from each other in relation to the race of the candidates, it is the demonstrable unwillingness of a substantial number of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests [that] is the linchpin of vote dilution by districting. . .
>
> "Unless it can be shown that an election occurred in which a white candidate ran on issues strongly affecting the black community and with an open, positive and strong identification with the black community -- which has not been shown in this matter -- candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized." *Citizens For A Better Gretna v. City of Gretna, La.* 636 F.Supp. (E.D. La. 1986) 1113, at 1133. (Emphasis in original.)

This passage goes in a rather different direction from that in *Thornburg.* There is an explicit insinuation of the race of the candidate. However, the trial court allowed for the remote possibility that a person of the white race could claim minority preferred status, by showing "an open, positive and strong identification with the black community". It found, however, that this condition had not been shown in Gretna. This is clearly erroneous.

How, one may ask, does a candidate demonstrate his/her "open, positive and strong identification with the black community"? In a democracy with a free system of elections the ultimate verdict is up to the electorate.

Using "bivariate ecological regression"[6] in the only regular Gretna aldermanic election analyzed at trial, it emerged that in 1977, three candidates were well established among black voters—LeBoeuf, Bush, and Jones. LeBoeuf and Bush were, moreover, sponsored by the black community. Jones was denied the endorsement of two black slating groups, the Black Caucus and the Westside Citizens Committee.[7]

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[6] This statistical technique was found to be standard in the analysis of racially polarized voting. See *Thornburg* at 2768, n. 20.

[7] *Record*, Vol. 1, p. 167-168.

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Bivariate Ecological Regression Estimates
of
Pluralities Among Black Voters:
City of Gretna
Aldermanic Election of 1977

| Candidate | Plurality (% of Black Vote) |
|---|---|
| LeBoeuf | 70% |
| Bush | 70% |
| Jones | 68% |

Source: *Original Brief on Behalf of Defendants/Appellants*, A21.

Of these three candidates, out of a total field of twelve, LeBoeuf and Bush are white, Jones is black. The question begging for resolution is how the trial court came to the conclusion that LeBoeuf and Bush were not running campaigns premised on "open, positive and strong identification with the black community"? Clearly they satisfied Gretna's black voters, and black slating groups, as to their open, positive and strong identification with the black community. On the basis of Supreme Court approved arithmetic, bivariate ecological regression, no other conclusion is tenable.

The circuit court recognized this problem. Its version of what occurred in Gretna is more arithmetically correct, but misstates *Thornburg's* definition of racial polarization. The Fifth Circuit rejected the arithmetic of the trial court and wrote:

> 'In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black.

> Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat[8] a black preference." *Gretna* 834 F.2d at 502.

It is not hard to discern a line of political thinking in this passage, which is both unsupported by the record and implausible on its face. By no means is it "unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters." There was nothing in the mechanics of Gretna's electoral law that forced minority voting convergence on two out of eleven white candidates; the only explanation was their open, positive and strong identification with the black community, as demonstrated by "standard" statistical methods. It is axiomatic that if courts are going to adopt statistical methods, they are going to have to live with the results.

What the Fifth Circuit advances as its doctrine of legally significant racial polarization is the idea that the defeat of *any* minority-preferred candidate, rather than their "usual" defeat, is grounds for a Section 2 violation. This is clearly at odds with governing statutory law and *Thornburg*. Minorities are not entitled even to proportional representation;[9] yet the Fifth Circuit advances the notion that *all* minority-preferred candidates are entitled to election; if one does not prevail, the candidate is entitled to a

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[8] Note the crucial absence of the word "usually."

[9] Two overwhelmingly minority-preferred candidates were elected in 1977. This amounted to 40% respresentation for a somewhat less than 30% minority.

more sanguine electoral mechanism. This warps the *Voting Rights Act* into a fancied *Candidate Protection Act.*

It might be argued that there is an alternative interpretation of the circuit court's position. It may be hypothesized that, had Jones been white, no finding of vote dilution would have emerged. There is, indeed, reason to think that this would have been the position of the Fifth Circuit, and, indeed, the trial court. (Petitioners will address this point immediately below.) But this would imply that the rights of minorities to non-dilutive electoral mechanisms are contingent on the race of the candidate. Can it be the thrust of the Constitution, the intent of the Congress, and the view of the Supreme Court that minority citizens cannot press a claim of vote dilution with preferred candidates of the white race?

b. The Race of the Candidate

The Court of Appeals is obviously chary of the limb it has hung its reasoning on. The circuit court noted Justice Brennan's view of the matter of race-of-candidate:

> "It is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." *Thornburg* at 2783-2784. (With three Justices concurring and one Justice concurring in part and concurring in the judgment. Emphasis in original.)

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8 Note the crucial absence of the word "usually."

9 Two overwhelmingly minority-preferred candidates were elected in 1977. This amounted to 40% representation for a somewhat less than 30% minority.

For reasons that are not perfectly clear, the circuit court wrote that Justice Brennan did not carry majority support for that statement; and it instead pointed to a passage from Justice White disavowing "interest group politics." *Id.* at 2783-2784. Petitioners submit that the "interest group" involved in Gretna is candidates, not voters. But what is at stake in the instant case is, precisely, the rights of voters. The Fifth Circuit has crafted a version of the law that creates protections for an obvious interest group: candidates, and incumbents, of color.

The reason for the assertion that the Fifth Circuit has confected a Candidate Protection Act lies in its own wording, which is a telling admission that minority voters are not entitled to relief in the absence of candidates of their own race:

> '[W]e conclude that *Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter -- but only within the context of an election that offers voters the choice of supporting a viable minority candidate. For although the Supreme Court plurality in *Gingles* emphasizes the race of the voters over the race of the candidate, it upholds the trial court finding of vote dilution based upon analyses of only those elections in which *blacks ran.* Justice Brennan's plurality opinion is careful not to state that a black candidate is tantamount to the black preference; but implicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate. The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we." *Gretna*, 834 F.2d at 504.

From this, it is clear, the Fifth Circuit would not have sustained a vote dilution claim in the City of Gretna had Jones been white, notwithstanding a presumed defeat by a white bloc. Black voters, without black candidates, are naked in the Fifth Circuit.

c. A Limited and Impractical Evaluation of Selected Reality

What was it that led the Fifth Circuit to adopt facts found in, and peculiar to, North Carolina as law in Gretna? Indeed, the facts peculiar to the issue in *Thornburg* were limited to contests which featured candidates of the black race -- dozens of candidates of the black race. See *Thornburg*, Appendix A, at 2782-2783.

In *Thornburg* the Court noted language from the Senate Report: "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality' ". At 2764 *Cit. om.* As matters turned out in North Carolina, the searching and practical evaluation amounted to examinations of black candidacies. But the thrust of the burden of proof scheme in *Thornburg* is towards a "flexible, fact-intensive test for Section 2 violations." *Id.* at 2774.

The Fifth Circuit would interpret *Thornburg* rigidly, so that the ability of blacks to recruit certain whites as their preferred candidates would also function to deprive them of relief under Section 2. But the Supreme Court did not confine review of vote dilution claims to the *facts* enumerated in *Thornburg*. Other facts may also be relevant and may be considered. What *Thornburg* mandates is a searching, practical evaluation of Gretna's past and present reality -- not North Carolina's.

The North Carolinization of Gretna led, in fact, to a very impractical search to muster support for a fatally flawed case against the City. In Gretna itself there were, in the circuit court's view, only two election periods amenable to statistical examination -- and those through rather permissive standards of statistics.[10] One instance was the regular aldermanic election of 1977. The second, in 1979, was a special election to fill one vacant seat.

In both instances there was one (and the same) candidate of the black race. In 1977 he was out-polled among blacks by two other candidates. No one contests this. In 1979 the same black candidate obtained anywhere between 49% - 65% of the black vote.[11] *Gretna*, 834 F.2d at 501-502. The 1977 election is clearly complicated by the *Thornburg* prong of "usual" loss by minority-preferred candidates; two of them won election. The 1979 election is complicated by its extraordinary nature and by the *Thornburg* prong of cohesiveness. Overall the Gretna elections are not persuasive; the case against the City cannot rest, by the accord of all parties to this litigation -- and by the accord of all courts that have reviewed the litigation -- on the thin foundation of two elections featuring one candidate. As the circuit court put it, there was "sparsity of available data." *Id.* at 502.

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[10] Other electoral periods, quite amenable to statistical examination, were excluded on grounds that those elections did not have candidates of the black race.

[11] This 15% spread is not surprising; bivariate ecological regression is a black art. See Wildgen, "Adding *Thornburg* to the Ticket: The Ecological Fallacy and Parameter Control in Vote Dilution Cases", 20 *Urban Lawyer* (Winter, 1988); Engstrom and McDonald, "Definitions, Measurements, and Statistics: Weeding Wildgen's Thicket," 20 *Urban Lawyer*, (Winter, 1988). Wildgen shows one way to commit the ecological fallacy, Engstrom and McDonald show, and endorse, six

Instead, plaintiffs extended their search to include exogenous elections, such as Rev. Jesse Jackson's 1984 bid in Louisiana's non-binding presidential preference primary. At this juncture, the same circuit court that rigidly excluded instances of white candidates pursuing, and winning, the support of Gretna's black voters, turned uncharacteristically flexible and argued that two exogenous elections (Jackson's and the race of Ben Jeffers, a candidate for Louisiana Secretary of State) were illustrative of local voting patterns. The court ignored, however, contrary exogenous evidence presented at trial: the candidacies of Sylvester Brown and Larry Napoleon "Boogaloo" Cooper (both black), *Gretna* 636 F.Supp. at 1126, n. 31. These candidates were rejected by voters of both races, indicating racial accord. It is inexplicable how these two elections are deemed not illustrative of local voting patterns.

The exclusion from consideration by the Fifth Circuit of the Brown and Cooper exogenous election results may be explained by focusing on a passage from a section remote from its consideration of exogenous elections. In writing of the relevance of the race of candidates, the circuit court speaks of "the context of an election that offers voters the choice of supporting a *viable* minority candidate." See *supra*, at 503. Emphasis added.

The drift of this line reasoning is that one can initiate a results-oriented search for polarization. Where it

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(footnote 11 continued)

additional ways of doing it.

In other instances bivariate ecological regression has demonstrated its manifest unstandardization and unreliability. In Norfolk, homogeneous precinct analysis revealed that one candidate, Joseph Green, received 32.2% of the white vote. Plaintiffs' regression analysis, in a train of three reports, yielded estimates of 20.2%, then 18.7%, and finally 26.5%. See *Collins v. Norfolk*, 679 F.Supp. 557 (E.D.Va. 1988) at 571.

does not exist, its absence can simply be attributed to candidate "non-viability." Here, again, one sees a court, *post-facto*, substituting its political preferences for the electorate's. Who, after all, is the final judge of the "viability" of a candidate? It is the electorate itself. Certainly it was not the intent of Congress that judges could whimsically select, and whimsically reject, verdicts of the electorate. The fundamental fact underlying the Brown and Cooper candidacies was the absence of polarization -- not loss attributable to white bloc voting.[12] If, for the sake of argument, one grants that exogenous elections have probative value, then *all* exogenous elections are relevant, not just selected -- and self-serving -- exogenous elections. Were one to proceed to use exogenous elections in an evenhanded manner, it would emerge, taking Jackson, Jeffers, Brown, and Cooper into account, that there was no pattern of usual loss attributable to bloc voting.

Petitioners take the position that law and precedent argue against resort to exogenous elections. As the following passage shows, there is direct conflict between the Fifth and Eleventh Circuits:

> "The reliance on other elections here is clearly misplaced. Since the City of Carrollton as the city defendant was severed from this lawsuit as a result of a settlement of the parites, it can hardly be said that the plaintiffs' evidence failed because they did not analyze Carrollton city elections. The voting rights statute is violated if a protected class has "less opportunity than other members of the electorate to participate in the political

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[12] Petitioners also bring to the Court's attention the tenuous claim that candidates Jackson and Jeffers had to "viability." In both instances their candidacies could easily be thought of as "offbeat."

> process and to elect representatives of their choice. The inquiry is the Carroll County singular commission form of government, not the City of Carrollton nor other municipality for that matter." *Carrollton v. Stallings,* 829 F.2d 1547 (11th Cir. 1987), at 1558, *cert. denied.* 108 S.Ct. 1111 (1988).

Petitioners submit that exogenous elections violate the spirit and letter of the notion of a "functional" view of the political process. In *Thornburg* the language drawn from previous cases clearly is not sympathetic to attempts to either exculpate or implicate jurisdictions by searching beyond the political unit in a quest for evidence of attainder by consanguinity. The real thrust of this so-called flexibility in interpreting *Thornburg* amounts to collective "corruption of blood," a legal concept anathema to the American constitutional tradition. Communities and their elected leaders are responsible for their own actions under a functional view of the electoral process. They cannot be punished for what happens elsewhere.

The language of *Thornburg* at page 2781 further buttresses petitioners' notion that the City of Gretna is accountable for its behavior, not behavior elsewhere:

> "In *Regester, supra,* we noted that the district court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that 'we are not inclined to overturn these findings, representing as they do a blend of history and an *intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise.*' " *White v. Regester,* 412 U.S. at 769-770. Emphasis added.

If such an intensely local appraisal cannot convince courts that a Section 2 violation exists, there seems to be no justification for an ever-widening search.

Rather, the proper focus should have been on Gretna's past and present political reality. The candidates'-race focused position of the Fifth Circuit prevented examination in court of Gretna's other aldermanic elections -- as though political reality ceases in the absence of candidates of the black race. This is contrary to the Fifth Circuit's own carefully crafted *Velasquez* doctrine, which requires a district court to make detailed findings of fact and to discuss all substantial evidence contrary to its decision. *Velasquez v. City of Abilene,* 725 F.2d 1017 (5th Cir. 1984).

## REASONS FOR GRANTING THE PETITION

### (1) The Court Below Erroneously Failed To Apply The Threshold Standards for a Finding Of Impermissible Vote Dilution Established In *Thornburg v. Gingles.*

*Thornburg v. Gingles* is unambiguous in requiring that plaintiffs demonstrate the existence of a geographically compact, politically cohesive minority group that usually sees its preferred candidates defeated due to the interaction of racial polarization and a challenged electoral mechanism.

In *Gretna* no pattern of usual loss could be demonstrated. As a result, the court below impermissibly narrowed the scope of evidence to candidates of the black race, and impermissibly widened the scope of evidence to exogenous elections.

(2) A Conflict Exists Among Circuit Courts as to The Relevance of Exogenous Elections.

In the trial court, and in the Fifth Circuit, it was determined that there was a sparsity of evidence in the City of Gretna's electoral record. One person, and the recipient of a plurality of votes from a non-cohesive minority in a second, special, election, was not deemed a sufficient factual basis for overturning Gretna's at-large system. So, both the district court and the Fifth Circuit turned to exogenous elections. In the Eleventh Circuit such exogenous elections are not deemed relevant. *Carrollton Branch of NAACP v. Stallings, supra.*

The reasoning of the Eleventh Circuit is limpidly clear. The responding party in vote dilution litigation is responsible for its collective behavior. It cannot exculpate itself by pointing to the absence of Section 2 violations in neighboring jurisdictions; *mutatis mutandis,* a jurisdiction cannot be subject to corruption of blood by the presumed presence of Section 2 violations in neighboring jurisdictions.

The reasoning behind the Fifth Circuit's open-ended policy of searching the horizon for evidence of racial polarization is premised on "flexibility" in interpreting Section 2 and *Thornburg.* As emerges in the next point, the Fifth Circuit haphazardly mixes legal flexibility with factual rigidity.

(3) This Case Raises Important And Unresolved Questions As To The Meaning Of What Constitutes A Minority Preferred Candidate.

It seems clear from statute, and from *Thornburg,* that the class protected by the Voting Rights Act is groups of voters. In *Gretna* it emerges that the class to be

protected is individual condidates of the black race. They can even be protected from black voters, in the Fifth Circuit, should those voters prefer candidates of the white race.

The Fifth Circuit erred in narrowly construing as law facts in the state of North Carolina. The fact that *Thornburg v. Gingles* was, coincidentally, concerned with dozens of black candidates, reflected political conditions in that state. Political conditions in Gretna are not analogous. A fact-intensive review of Gretna's past and present local political reality uncovers a pattern of assiduous courtship of black voters by white candidates – and a pattern of endorsement of those candidates by black slating groups. Denial to these candidates of "minority preferred" status, exclusively on the basis of the color of their skin, is at odds with the ultimate purpose of the Voting Rights Act.

(4) The Decision Below Has Far-Reaching Ramifications For The Status of Minorities and Local Governments under Section 2 of the Voting Rights Act.

The race-of-candidate-conscious and exogenous-election-permissive stance of the Fifth Circuit is, fundamentally, a circumvention of Congress's explicit denial of a right to proportional representation. Should the Fifth Circuit's view of Section 2 stand, the floodgates would be opened to litigation challenging the existence of at-large election provisions throughout the country. No jurisdiction, no matter how racially unpolarized, would be immune to attack on the grounds that some exogenous election -- Jesse Jackson's 1984 bid for the presidency, for example -- demonstrated that a "viable" candidate of the black race was defeated by a majority bloc. It is specifically not the intent of Congress, nor the view of the Supreme Court, that at-large systems are *per se* dilutive mechanisms. But race-

conscious interpretations of exogenous elections, in contravention of legal standards calling for intensely local appraisals, inevitably stain by consanquinity all local governments.

## CONCLUSION

The errors committed as a result of the Fifth Circuit's-denial of *Thornburg's* threshold criteria-the establishment of the race-of-candidate as a determining factor in establishing racial polarization, and the insinuation of exogenous elections into the evidentiary base-conflict with the Voting Rights Act, *Thornburg v. Gingles* and the law in other circuits. Just as importantly, these errors amount to a mechanism for the judicial imposition of a race-based formula for proportional representation that does not protect voters so much as it protects candidates.

Petitioners accordingly request this Court to grant their petition for a writ of certiorari to, among other things, clarify the statutory directives of the pertinent provisions of the Voting Rights Act and resolve the conflict among

the circuit courts as to the relevance of exogenous elections and candidate race. The unprecedented and unsubstantiated interpretation of the Voting Rights Act and *Thornburg v. Gingles* by the Fifth Circuit must be corrected and calls for an exercise of this Court's power of supervision.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of October, 1988, served two copies of the foregoing Petition upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

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JON A. GEGENHEIMER

# APPENDIX A

**CITIZENS FOR A BETTER GRETNA**
**et al., Plaintiffs-Appellees,**

**v.**

**CITY OF GRETNA, LOUISIANA, et al.,**
**Defendants-Appellants.**

No. 86-3863

United States Court of Appeals,
Fifth Circuit.

Dec. 23, 1987.

Black voters brought action under Voting Rights Act challenging city's at-large aldermanic elections. The United States District Court for the Eastern District of Louisiana, 636 F.Supp. 1113, Robert F. Collins, J., found that election system violated Act, and city appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) fact that white candidates received higher percentage of black vote than black candidate in aldermanic election did not negate finding of racial bloc voting; (2) evidence of nonaldermanic elections involving black candidates was admissible, where district court had statistical data of only two city aldermanic elections; and (3) at-large aldermanic elections violated § 2 of Voting Rights Act.

Affirmed.

---

Jon A. Gegenheimer, City Atty., Gretna, La. for defendants-appellants.

Harold E. Molaison, Gretna, La., for Mayor Ronnie C. Harris.

Alice M. Jacobs, Jack W. Jernigan, III, Ronald L. Wilson, New Orleans, La., for plaintiffs-appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In this minority vote dilution case, the City of Gretna, Louisiana appeals the finding that at-large elections of Gretna aldermen violate § 2 of the Voting Rights Act of 1965 as amended in 1982.[1] This Circuit set out guidelines for evaluating minority vote dilution claims in *Zimmer v.*

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[1] Section 2, as amended, 96 Stat. 134, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in sub-section (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

*McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc) *aff'd on other ground sub nom, East Carrol Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam). The district court followed *Zimmer* guidelines in finding a § 2 violation within Gretna's at-large aldermanic election scheme.

Closely following after the district court's opinion of May 12, 1986, 636 F.Supp. 1113, is the Supreme Court's § 2 minority vote dilution case. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Appellant City of Gretna claims *Gingles* replaces the pre-existing vote dilution analysis of *Zimmer*, and necessitates remand of this case. We disagree, and affirm the district court's decision.

At the heart of a § 2 vote dilution claim lies the issue of whether minorities have an equal opportunity to elect their candidates of choice. *Gingles* set out a three-part foundation for proving a § 2 vote dilution claim: first, that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; second, that the minority is politically cohesive; and third, that the majority votes sufficiently as a bloc usually to defeat the minority preferred candidate. *Gingles*, 106 S.Ct. at 2766-67. Based upon our reading of *Gingles*, we find the district court's analysis sufficient to establish a violation of § 2 existing in the at-large elections of Gretna aldermen. We first address the effect of *Gingles* on the frame-work previously set out by *Zimmer*. Then we discuss *Gingles'* emphasis on racial bloc voting and its application to the situation in Gretna.

1. *Background*

Appellees Citizens For a Better Gretna[2] brought this class action on behalf of black registered voters in the City of Gretna. The class alleged violations of § 2 of the Voting Rights Act of 1965 as amended in 1982, 42 U.S.C. § 1983, and the Fourteenth and Fifteenth Amendments of the United States Constitution. The district court upheld the class' claim for relief under § 2 of the Voting Rights Act, and did not address the § 1983 claim or the constitutional claims.

The trial court determined the § 2 violation from factual findings structured along *Zimmer* guidelines.[3] We find none of these determinations to be clearly erroneous.[4]

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[2] Citizens for a Better Gretna is an unincorporated association of citizens of the City of Gretna. Its members include Jerome Black, Noreen V. Boyd, Sylvester Brown, Burnell Darensburg, Jr., Alex Gourgis, Sr., Bernice Gourgis, Warren G. Lombard, Leo Jones, Charles L. Mar, Verta M. Mar, and Sammie Walker. Each is a resident of the City of Gretna and a registered voter. They sue individually and as representatives of the class.

Appellants are Mayor William J. White and Aldermann James Bush, Sr., Salvador Marchese, Jr., Louis LeBoeuf, Jr., Gerard E. Schexnayder, and Hubert F. Uzee. They are sued in their individual capacities and as representatives of the City of Gretna.

[3] We summarize the trial court's findings in Part II of this opinion, but a detailed account of conditions in Gretna is contained in the district court's opinion, *Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113, 1116-1123 (E.D.La.1986). Gretna's history of official discrimination in voting, housing, and education casts lingering effects upon the city's black population: housing remains segregated: four times more blacks than whites lived below poverty level in Gretna in 1980; Gretna's black voter turnout was 22 percent lower than white voter turnout in 1981, and 26 percent lower in 1977.

[4] The Supreme Court in *Gigles*, upheld the "clearly erroneous" test of Federal Rule of Civil Procedure 52(a) for review of factual findings of § 2 claims, as well as for the ultimate determination of vote dilution. 106 S.Ct. at 2781. A factual finding is clearly erroneous if it is unsupported by the record or creates the firm convition that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct 525, 541-42, 92 L.Ed. 746 (1948). We find neither to be the case with the district court's determinations.

Hence, the issue presented is whether the factual findings support a § 2 violation under *Gingles*.

## II. *Gingles & Zimmer*

Appellant urges this Court to reverse the district court opinion because it relies on *Zimmer*. We are asked to remand the case for consideration under *Gingles*. We cannot agree that the Supreme Court in *Gingles* made the *Zimmer* analysis obsolete. In fact, the Court relied substantially on *Zimmer* as a foundation for the analytical framework prescribed for § 2 claims.[5]

Taken from the Senate Judiciary Committee Report accompanying the 1982 amendment of the Voting Rights Act, the factors to be considered in evaluating a § 2 claim include the following:

> (1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) The extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the majority group;

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[5] *Gingles* upheld the "results test" set out in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) and refined by *Zimmer*, whereby a Voting Rights Act violation may be shown by discriminatory effect. *Gingles*, 106 S.Ct. at 2759.

(4) If there is a candidate slating process, whether the members of a minority group have been denied access to that process;

(5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) Whether political campaigns have been characterized by overt or subtle racial appeals;

(7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

The *Gingles* opinion traced the Senate Report guidelines (*Zimmer* factors)[6] in evaluating the North Carolina legislative election scheme there at issue. The Court found a § 2 violation based upon the totality of circumstances in North Carolina districts: "racially polarized voting, the legacy of official discrimination in voting, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multi-member districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice." *Gingles*, 106 S.Ct. at 2782.

The district court found similar conditions existing

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[6] Footnote 4 in *Gingles*, 106 S.Ct. at 2759 states: "These factors were derived from the analytical framework of *White v. Regester*, [cite omitted] as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*. . . ."

in Gretna by following virtually identical guidelines. We briefly summarize these factual findings: (1) No black person has ever been elected alderman in Gretna, despite its population being thirty percent black. (2) Only two black candidates have run for alderman in Gretna: these in three elections. (3) Of the three Gretna aldermanic elections with black candidates, only two were capable of being statistically analyzed. (4) The two elections involved black candidate Leo Jones. He received the support of a majority of Gretna's black voters but little or no support from white voters. (5) In the 1984 presidential primary and the 1979 race for Louisiana Secretary of State, Gretna's black voters overwhelmingly supported black candidates and white voters largely did not. (6) Statistical data presented to the trial court in a correlation and regression analysis and in a homogenous precinct analysis support the existence of racial polarization (racial bloc voting) in Gretna's elections. (7) A history of *de jure* and *de facto* discrimination contributes to depressed socio-economic conditions for Gretna's blacks and a low black voter turnout. (8) An unofficial slating system excludes black candidates from Gretna city elections. (9) The Gretna majority vote requirement combines with the at-large system to produce dilution of black voting power. These factual findings are amply supported by the record, so we next consider the district court's finding of legally significant racial bloc voting.

## III. *Bloc Voting*

Racial bloc voting is the linchpin of a § 2 vote dilution claim, and plaintiffs must prove it. *Gingles*, 106 S. Ct. at 2764. The district court found significant racial bloc voting in Gretna based upon statistical data presented in

a correlation and regression analysis[7] and a homogenous precinct analysis.[8]

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[7] Correlation and regression analysis expresses the degree of relationship between two variables. The two variables in this case are (1) proportion of the voting age population in Gretna that is black (the independent variable) and (2) electoral support for the black candidate (the dependent variable). Statistical coefficients, "r" and "b", summarize the consistency and strength of these two variables. The "r" coefficient measures how consistently the percentage of voters supporting the black candidate (the dependent variable) varies with the black proportion of the voting age population (the independent variable). There is a positive relationship between these two variables if the percentage of voters supporting a black candidate tends to increase as the black percentage of the voting age population in the precinct increases. If the percentage of the voters supporting the black candidate decreases as the percentage of the black voting population increases, then a negative relationship exists. The more consistent the tendency, the greater the value of the "r" which can range from + 1.0 (perfectly consistent positive relationship) through 0.0 (no relationship) to -1.0 )perfectly consistent negative relationship). Appellee's expert reported "r" values of .963 and .926 for the aldermanic elections of 1979 and 1977 respectively. For criticism of the "r" factor, see *Jones v. City of Lubbock,* 730 F.2d 233 (5th Cir.1984).

The "b" coefficient estimates how strongly these two variables are related; that is, the extent to which the percentage of voters supporting the black candidate can be expected to change in response to changes in the black percentage of the voting age population. Thus, a "r" reading of + 1.0 shows a perfect correlation between increase in the number of black voters and increase in votes for the black candidate; the "b" reading estimates how much of an increase in votes for the black candidate will result from each incremental increase in the percentage of black voters. Appellee's expert presented "b" values of .590 for 1979 and .539 for 1977. the measures were then plotted on a graph (scattergram). *See Gretna, supra,* 636 F.Supp. at 1136-37 (graphs).

[8] Although the district court mainly relied upon appellee's regression analysis for its finding of bloc voting, it considered the homogenous precinct analysis to be supportive of that finding. *Gretna,* 636 F.Supp. at 1128-29. The homogenous precinct analysis examined 1979 and 1977 election results from Gretna's all-white precincts and found the black candidate to finish last in every case. The analysis also examined results from Gretna's two majority black precincts and estimated Jones to have garnered 65.9 percent of the black vote in those precincts in 1979.

Appellant claims the district court's finding of bloc voting fails to conform to the standards set out by the Supreme Court in *Gingles*. Appellant specifies three deficiencies in the district court's analysis: (1) the district court based its finding of bloc voting on the statistical methods of appellee's expert, which are not the same methods as those relied upon by the Supreme Court in *Gingles*; (2) the district court considered statistical evidence of racial bloc voting in non-aldermanic elections, specifically the 1984 presidential primary in which Jesse Jackson ran and the 1979 race for Louisiana Secretary of State featuring black candidate Ben Jeffers; (3) by looking only at elections in which blacks were candidates, the district court focused on the race of the candidate rather than the race of the voter, which is contrary to *Gingles*. We address these claims in turn.

A. *Statistical Analyses*

The statistical methods applied in Gretna vary to some extent from those used in *Gingles*. *The Supreme Court in Gingles* stated the purpose of the bloc voting inquiry to be two-fold: "To ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." 106 S.Ct. at 2769. The Court did not mandate any particular statistical method for evaluating vote dilution claims.[9] It merely

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[9] The *Gingles* Court affirmed a finding of bloc voting in North Carolina based upon statistical analyses of fifty-three general and primary elections involving black candidates conducted over three election years, in six multi-member districts. The methods of analysis used were extreme case analysis and bivariate ecological regression analysis. *See* 590 F.Supp. 367-72. Extreme case analysis focused on voting in racially segregated precincts; and regression analysis used racially segregated and racially mixed precincts to determine whether blacks and whites (continued)

accepted the methods presented, noting them to be standard in the literature. *Gingles*, 106 S.Ct. at 2768 n. 20.

Appellants attack the validity of the regression analysis presented by appellee's expert and relied upon by the district court. This correlation and regression analysis correlates by precinct the race of the voter with votes received by a particular candidate.[10] Appellant claims that its regression analysis is superior to that of appellee's expert. Resisting the obfuscation created by dueling statisticians, we address appellant's core criticism: Leo Jones, who was one of two blacks who ran for Gretna alderman and the only black aldermanic candidate whose election results could be analyzed statistically, was *not* the aldermanic preference of Gretna's black voters.

Jones ran for alderman in 1977 and in 1979. Appellee's expert concludes that in 1979, Jones received 60 to 65 percent of the black vote and 1 percent of the white vote; in 1977 he received 65 to 67 percent of the black vote and

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(footnote continued)[9] voted differently with respect to a dandidate's race. These complementary methods measured correlation between voters of specified race and votes for a candidate of particular race. Political cohesiveness was determined from evidence showing black support for black candidates to range between 71 percent and 92 percent in the primaries and 87 percent to 96 percent in the general elections. The Court accepted evidence of white bloc voting, which showed that an average of 81.7 percent of white voters did not vote for black candidates in the primaries, and two-thirds of the white voters did not vote for black candidates in the North Carolina general elections.

[10] *See* footnote 7 *supra*.

11 to 12 percent of the white vote.[11] Appellant's expert, howerer, did his own bivariate regression analysis of the 1979 election and concluded that Jones only obtained about 49 percent of the black vote and 1.5 percent of the

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APPELLEES' RESULT OF REGRESSION ANALYSIS FOR THE 1977 AND 1979 GRETNA ALDERMANIC ELECTIONS

| Year | Correlation Coefficient | Unstandardized Regression Coefficient | Standard Error of the b | *Intercepts Left (white) Right (black) |
|---|---|---|---|---|
| 1979 | | | | |
| Unweighted: | | | | |
| | r=.963 | b=.590 | (.050) | 1.0% |
| | | | | 60.0% |
| Weighted: | | | | |
| | r=.962 | b=.648 | (.002) | 0.9% |
| | | | | 65.7% |
| 1977 | | | | |
| Unweighted: | | | | |
| | r=.926 | b=.539 | (.066) | 11.2% |
| | | | | 65.1% |
| Weighted: | | | | |
| | r=.908 | b=.553 | (.003) | 12.0% |
| | | | | 67.2% |

*The far right column represents the percent of votes won by black candidate Leo Jones. In each row, the top figure is Jones' percent of the white vote, and the lower figure represents his percent of the black vote.

white vote.[12] Appellant cites its analysis as proof that Jones was not the black preference.

[1] According to the Supreme Court in *Gingles*, however, bloc voting can be proved in part by showing that a "significant number of minority group members usually vote for the same candidate. . . ."[13] Both appellant's and appellee's regression analyses reveal a "significant number " of blacks voting for Jones. This qualifies Jones as a black preferred candidate.

[2] Appellant also claims that Jones was not the black preferred candidate in the 1979 aldermanic election because two white candidates received a higher percentage

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APPELLANT'S RESULTS OF BIVARIATE ECOLOGICAL REGRESSIONS AS APPLIED TO GRETNA ALDERMANIC ELECTIONS

Recapitulation of Bivariated Ecological Regression Analyses

| CANDIDATE | WHITE PREFERENCE | SLOPE | BLACK PREFERENCE | FRACTIONALIZATION WHITE | BLACK |
|---|---|---|---|---|---|
| Jones 79 | 1.524 | 0.478 | 49.324 | 0.030 | 0.500 |
| LaBruzza 79 | 16.034 | -0.106 | 5.434 | 0.269 | 0.103 |
| Marchese 79 | 30.782 | -0.255 | 5.282 | 0.426 | 0.100 |
| Weigel 79 | 3.087 | 0.120 | 15.087 | 0.060 | 0.256 |
| Kennedy 79 | 9.78 | -0.052 | 4.58 | 0.176 | 0.087 |
| Leger 79 | 1.795 | 0.014 | 3.195 | 0.035 | 0.062 |
| Ward 79 | 26.448 | -0.228 | 3.648 | 0.389 | 0.070 |
| Züfle | 4.075 | -0.043 | -0.225 | 0.078 | -0.005 |

Note:

13 *Gingles, supra*, 106 S.Ct. at 2769. We realize that this statement imposes the requirement of a pattern of bloc voting by its mention of "usually." We find evidence, beyond Jones performance in elections, that establishes a pattern of bloc voting. This evidence together with the Supreme Court's recommendation of flexibility for § 2 cases, are discussed in Part III B of this opinion, *infra*.

of the black vote than was garnered by Jones.[14] This does not negate the district court's finding of racial bloc voting. Again, *Gingles* defines bloc voting as white majority bloc voting that defeats minority preferred candidates. 106 S.Ct. at 2767. In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference.

B. *Exogenous Elections*

Appellee's analyses of other elections in which Gretna citizens had the opportunity to vote for a black candidate support the finding of a pattern of racial bloc voting in Gretna.[15] Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting—particularly in light of the sparsity of available data.

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[14] Appellant demonstrates that, using appellees method of analysis, white candidates Bush and LeBouef each took 70% of the black vote in Gretna's 1977 aldermanic election, whereas Jones only received approximately 67%.

[15] In the 1984 presidential primary, Gretna's black voters overwhelming supported Jesse Jackson; Gretna's white voters did not. In the 1979 election for Louisiana Secretary of State, a majority of Gretna's black voters supported black candidate Ben Jeffers; and Gretna's white voters did not.

Black candidates have entered Gretna aldermanic elections on only three occasions.[16] Statistics are available for two of those elections, Jones in 1977 and Jones in 1979. Appellant claims that a showing of bloc voting cannot be premised solely on these two elections because the *Gingles* opinion requires "a searching practical evaluation of 'past and present reality.' " 106 S.Ct. at 2764. Two elections, it claims, do not reflect past and present reality.

*Gingles,* however, suggests flexibility in the face of sparse data: "where a minority group has begun to sponsor candidates just recently the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." 106 S.Ct. at 2770 n. 25. Justice Brennan speaking for the Court, ecplains the need to tailor a § 2 analysis that will fit the issues of each particular vote dilution case. In this case, appellants would have us interpret *Gingles* rigidly so that the inability of Gretna's blacks to participate as aldermanic candidates would also function to deprive them of relief under § 2. But the Supreme Court did not confine review of vote dilution claims to the factors enumerated in the opinion: 'While the

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(footnote 15 continued)

| Election | Results of Exogenous Elections White(%) | Black(%) |
|---|---|---|
| 1984-Jackson | | |
| * Unweighted | 1.6 | 95.5 |
| * Weighted | 1.7 | 95.3 |
| 1979-Jeffers | | |
| Unweighted | 7.5 | 70.1 |
| Weighted | 7.9 | 70.1 |

*The term "unweighted" as used here means that each precinct in Louisiana was treated as an equal unit in determining these values, regardless of the actual number of voters cast in those precincts. The term "weighted" is used to take into account differences in the number of votes across precincts.

16 Edwin Romain in 1973, and Leo Jones in 1977 and 1979.

enumerated [*Zimmer*] factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." *Gingles,* 106 S.Ct. at 2764 (footnote omitted).

[3] In light of the flexible standard advised by Gingles, the district court properly considered the two non-aldermanic elections, Jackson in 1984 and Jeffers in 1979. Because the district court had statistical data of only two Gretna aldermanic elections to consider, it properly looked to voting patterns in two additional elections in which Gretna had the opportunity to vote for a black candidate. This evidence is relevant to showing that blacks and whites in Gretna vote differently and in bloc. Further, we are persuaded by appellee that although the Jeffers and Jackson results are not those of Gretna aldermanic elections, they qualify as a local appraisal because they reflect local voting patterns.

We need not conclude that election results from outside the challenged electoral system are always appropriate for consideration under § 2. In this case, however, with sparse relevant statistical data, the district court rightly considered exogenous elections.

C. *The Race of the Candidate*

We consider Jones to be an aldermanic candidate sponsored by Gretna's minority group because he received a significant portion of the black vote,[17] and because he is black. Appellant claims that considering the race of the

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[17] Relying on appellees' statistics, Jones received roughtly 65% of the black vote in Gretna in 1977 and 1979. Following appellant's statistics, Jones received only 49% in 1979. Both sets of statistics indicate Jones as a black aldermanic preference. *See supra,* discussion at Part III A of this opinion.

candidate is inconsistent with *Gingles'* recommendation to consider only the race of the voter. Appellant claims the district court erred in determining racial bloc voting from only those elections in which blacks were candidates.

In a plurality section of the *Gingles* opinion, Justice Brennan notes that although the black minority preferred candidate is usually black, the race of the votor—rather than the race of the candidate—is the proper focus. Hence the black preferred candidate need not necessarily be black: "Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." *Gingles,* 106 S.Ct. at 2776.

Justice Brennan does not, however, carry majority suppport for this statement. Justice White specifically disavows it as indicative of interest group politics. *Gingles,* 106 S.Ct. at 2783-84 (White, J., concurring). And Judge Higginbotham, in his dissent to this Circuit's recently vacated vote dilution case,[18] shares Justice White's apprasial, warning of the potential chaos created by a lack of Supreme Court consensus on this aspect of racial bloc voting. Such forecasts properly raise concerns about the dangers in advancing interest group politics or enforcing proportional representation.[19]

[4] Mindful of these concerns, we conclude that *Gingles* is properly interpreted to hold that the race of the

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[18] *United Latin American Cities v. Midland Independent School District,* 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham dissenting).

[19] Section 2 concludes with the following: "*Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate. For although the Supreme Court plurality in *Gingles* emphasizes the race of the voter over the race of the candidate, it upholds the trial court finding of vote dilution based upon analyses of only those elections in which *blacks ran.* Justice Brennan's plurality opinion is careful not to state that a black candidate is tantamount to the black preference; but implicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate. The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we.

IV.

[5] We conclude that the district court was not clearly erroneous in finding that Gretna's at-large aldermanic elections violate § 2 of the Voting Rights Act. The district court decision was correctly based on a totality of the circumstances, delineated by *Zimmer* factors. Most notable among those factors is the presence of racial bloc voting in Gretna's aldermanic elections. We also note that in the entire history of Gretna, with a 30 percent black population, no black has ever been elected to municipal office. Further, we, like the Supreme Court in *Gingles,* recognize the district court's familarity with political realities of the local area. 106 S.Ct. at 2782. We affirm the district court's finding that at large elections of Gretna aldermen are violative of § 2. We affirm its judgment enjoying the at-large system and approcing the city's proposed redistricting plan.[20]

AFFIRMED.

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[20] The City of Gretna plan provides for a five member board of aldermen, consisting of four aldermen elected from separate districts and one alderman elected at-large.

## APPENDIX B

**CITIZENS FOR A BETTER GRETNA, et al.,**

**v.**

**CITY OF GRETNA, LOUISIANA, et al.**

**Civ. A. No. 84-4901**

United States District Court,
E.D. Louisiana.

May 12, 1986.

Black voters brought suit under Voting Rights Act challenging city's "at-large" election system. The District Court, Robert F. Collins, J., held that "at-large" election system, together with majority vote requirement for election to board of alderman, tended to dilute political strength of minority groups, in violation of Voting Rights Act.

Order accordingly.

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Alice M. Jacobs, Suzanne Weiner, Jack W. Jernigan, Ronald L. Wilson, New Orleans, La., for plaintiffs.

Jon A. Gegenheimer, City Atty., City of Gretna, Gretna, La., for defendants.

### OPINION

ROBERT F. COLLINS, District Judge.

When Congress passed the Voting Rights Act[1] in 1965 to eliminate voting discrimination and to affirm the fundamental right of each citizen to participate fully in elections, President Lyndon Johnson hailed its enactment as a "triumpth for freedom as huge as any ever won on any battlefield."[2] The weapon Congress utilized to secure that freedom was Section 2 of the Act, which created a right of action for private citizens or the government to challenge voting practices or procedures.[3] This case evokes a consideration of the extent to which plaintiffs have properly used that weapon (in its amended form) to attack the election procedure of the Board of Aldermen for the City of Gretna, Louisiana. Specifically, the Court is called upon to determine under what circumstances does a governmental election scheme operate to minimize or cancel out the voting strength of racial minorities within the City of Gretna.

This class action is brought pursuant to Section 2 of the Voting Rights Act of 1965 and the Voting Rights Act amendments of 1982, 42 U.S.C. § 1983 and the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiffs, Jerome Black, Noreen V. Boyd, Sylvester Brown, Burnell Darensburg, Jr., Alex Gourgis, Sr., Bernice Gourgis, Warren G. Lombard, Leo Jones, Charles L. Mar, Verta M. Mar and Sammie Walker, are all black

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[1] Pub.L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1976))(further amended by the Voting Rights Act Amendments of 1902, Pub.L. No. 97-205, 96 Stat. 131) (codified at 42 U.S.C. §§ 1973, 1973b, 1973aa-1a-6 (West Supp.1983.)).

[2] Senate Comm. on the Judiciary, Report on S. 1992, S.Rep. No. 417, 97th COng., 2nd Sess. 4 [hereinafter cited as S.Rep.], reprinted in 1982 U.S.Code Cong. & Adm.News 177.

[3] See, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, McKenzie & Krauss, 19 Harvard Civil Rights—Civil Liberties Law Review 155 (Winter 1984).

citizens of the United States and the State of Louisiana. They are residents of the City of Gretna and are registered to vote there. Citizens for a Better Gretna is an unincorporated association of citizens of the City of Gretna. Its members include the above named plaintiffs. The plaintiffs sue individually and as representatives of the class of black registered voters of the City of Gretna, Louisiana.

The City of Gretna is a municipal corporation formed under the laws of the State of Louisiana, particularly the Lawrason Act, LSA-R.S. 33:51 *et seq.* As such, it is a political subversion of the State of Louisiana. Defendant, William J. White, is the Mayor and Chief Executive Officer of the City of Gretna, and he is sued both in his individual and official capacities. James Bush, Sr., Salvadore Marchese, Jr., Louis LeBoeuf, Jr., Gerald E. Schexnayder and Hubert F. Uzee are Aldermen of the City of Gretna, and they are sued both in their individual and representative capacities.

Jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331, 1343 and 1344.

The gravemen of plaintiffs' claim is that the "at-large" election system, together with the majority vote requirement for election to the Board of Alderman (LSA—R.S. 18:511 A), currently employed by the City, effectively prevents blacks from participating in the political process in a reliable and meaningful fashion in two basic ways. First, it ensures that the white voters will continue to elect all members to the Board of Alderman, while blacks will continue to have neither the opportunity nor ability to be elected; and secondly, by doing so, it operates to minimize or cancel out the black voting strength in the City by denying blacks the opportunity to elect blacks to the Board of Aldermen, even though they comprise a significant portion

of the total population of the City—all in a manner that violates rights of the plaintiffs secured by Section 2 of the Voting Rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973 (Section 2 of the Voting Rights Act), 42 U.S.C. § 1983, and the Fourteenth Amendments to the United States Constitution.

[1] This Court concludes, on the basis of factual findings, that the "at-large" system of election to the Board of Alderman in the City of Gretna violates Section 2 of the Voting Rights Act, and that plaintiffs are therefore entitled to appropriate relief, including an order enjoying defendants from conducting elections under the existent "at-large" system. Because the Court upholds plaintiffs' claim for relief under Section 2 of the Voting Rights Act, we need not address their other statutory and constitutional claims seking the same relief.

*The Standard of Proof under Section 2*

The language of Section 2(b), supplemented by its legislative history, provides the statndard of proof for finding a Section 2 violation. The Senate Report delineates specific factors which a court should consider in determining whether the political process of a state or subdivision thereof violates Section 2. In determining whether, "based on the totality of circumstances," a subdivision electoral mechanism does so "result" in racial vote dilution, Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) and subsequently elaborated by the former Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd on other grounds sub nom., East Carroll Parish School Board v. Marshall,* 424

U.S. 636, 96 S.Ct. 1983, 47 L.Ed.2d 296 (1976) (per curiam). These factors typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

1. the extent of any history of official determination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been charazterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[4]

*"Zimmer Factors"*

The Court finds the following circumstances to have contributed to dilution of minority voting strength in Gretna by use of the at-large scheme for election of aldermen and incorporates them as Findings of Fact in this case.

## FINDINGS OF FACT

*Past Discrimination and Its Lingering Effects*

A history of discrimination is important evidence of both discriminatory intent and discriminatory result. Past discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Indeed, past discrimination may manifest itself in present-day socio-economic disadvantages, which in turn can reduce participating and influence in political affairs. The historical record of discrimination in the State of Louisiana and the

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[4] Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution. S.Rep. No. 97—417 at 28—29, U.S.Code Cong. & Adm.News 1982, pp. 206-207 (footnotes omitted).

Parish of Jefferson is undeniably clear, and the record suggests it has not ended even now.

The history of black citizens' attempts, in Louisiana since Reconstrution, to participate effectively in the political process and the white majority's resistance to those efforts is one characterized by both *de jure* and *de facto* discrimination. Indeed, it would take a multi-volumed treatise to properly describe the persistent, and often violent, intimidation visited by white citizens upon black efforts to participate in Louisiana's political process. 'Plaintiffs' expert, historian Dr. Raphael Cassimere, has traced that history very clearly and cogently to its genesis-slavery.

Disenfranchisement of blacks as an acknowledged state policy pre-dates the Civil War. Even free blacks who were property owners, were denied the right to vote. Most blacks, consequently, even while ostensibly "free," remained enslaved, bereft of one of the most basic of human rights—the right to vote.

With the advent of post-Civil War Reconstruction and the emancipation of slaves, federal intervention[5] led to some desegregation of schools, integration of public facilities and perhaps most importantly, registration and political participation for blacks within the state. Black suffrage flourished from 1867 to 1898. Black persons were elected to state office, including the position of lieutenant governor. Three black persons were elected to Congress,

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[5] Section 2 of the Fourteenth Amendment promised southern states more representation in Congress if they would repeal laws excluding blacks from voting. Later Congress passed more profound provision within the Fifteenth Amendment, which precluded state authorities from denying—or abridging—the right of citizens to vote on account of race, color or previous conditions to servitude.

although only one of them was ever seated.[6] The white population reacted to the enfrandhisement and social elevation of blacks by forming white leagues to challenge the legitimate state government which had previously been elected by a heavily black electorate. Inevitably, racial tensions sparked violence throughout the State. In 1877, when the feneral government ceased to monitor state government, the White League, previously held in check, assumed legislative control of the state.

Consequently, the period of enfranchisement for blacks which lasted approximately 30 years gradually came to an end. By 1898, thanks in no small part to the drafting of a new constitution, blacks were completely disenfranchised in the State of Louisiana. The Constitution of 1898 created a registration provision which included both education and property requirements; that is, unless individual was exempted by the so-called "grandfather" or "fighting grandfather" clauses. The provision, *designed* to purge blacks from the registration rolls. proved to be extremely effective. For example, in 1897, there were over 130,000

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[6] *See Major v. Treen*, 574 F.Supp. 325, 340 (E.D. La. 1983), testimony of Dr. Raphael Cassimere:

> "With the advent of post-Civil War Reconstruction, black males were permitted to register. Between 1868 and 1896 many black state legislators were elected. Two blacks were elected Lieutenant Governor and one, P.B.S. Pinchback, was selected by the state Senate to fill a vacancy in that position and later served as Acting Governor. Pinchback subsequently was selected to serve in the United States but was not seated. Three blacks claimed seats in the United States House of Representatives but only one, Charles E. Nash, was seated."

*Id.* at 340, See also, J. Morgan Kousser, The Shaping of Souther Politics: Suffrage Restriction and the Establishment of the One—Party South, 1880-1910 (New Haven, Conn., Yale University Press, 1974).

black registered voters; by 1900, only 3 years later, less than 5,000 black persons remained on the voter rolls.

Following the Supreme Court's invalidation of the grandfather clause in 1915, *Guinn v. U.S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), the state legislature drafted a constitution with a sufferage provision which included an interpretation and good morals test. These tests were rarely used during the first 23 years of existence because the party in control, the Democrats, held white-only primaries. Blacks were denied the right to seek office or cast a ballot in any Democratic primary thus prohibiting black participation in the electoral process. The interpretation test was not enforced because it was not necessary to exclude blacks; they were already effectively excluded.

White primaries, however, were abolished in 1944 again igniting statewide enforcement of the interpretation test. In 1954, due to increased black registration, vigorous enforcement of this test was encouraged by a Joint Legislature Committee of the Louisiana legislature. However, because of the small number of black persons living in Jefferson Parish, it was unnecessary for the registrar strenuously to enforce such test.

Beginning with the 1950's and continuing until sometime after the interpretation test was invalidated in 1963, Jefferson Parish blacks, unlike whites, were required by the registrar to state their age exactly in terms of number of years, months and days, and to recite the preamble to the United States Constitution in order to register to vote.

*Effects of Discrimination in Facilities, Education, Employment, and Housing*

Like other southern states, prior to the passage of the federal Civil Rights Act in 1964, all public facilities, including courthouses, public accommodations, transportation, recreational facilities, schools,[7] and shops were racially segregated throughout Louisiana, some were segregated as late as the 1970's. Blacks were systematically denied access to restaurants, forced to sit in the rear of buses and subjected to separate and unequal facilities. That these disabilities, generally experienced by blacks throughout the State of Louisiana were also experienced by black residents of Gretna, was convincingly attested to by several of the witnesses.[8]

Schools in Jefferson Parish remained segregated until 1971, when integration was ordered by the court in *Dandridge v. Jefferson Parish School Board*, 332 F.Supp. 590, *application denied*, 404 U.S. 1219, 92 S.Ct. 18, 30 L.Ed.2d 23, aff. 456 F.2d 552, *cert. denied*, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240. The Parish response to the *Dandridge* threat of racial integration was to institute sexual segregation at the high school level. Not until 1978 in *Helwig v. Jefferson Parish School Board*, C.A. No. 74-2143 (unpublished Opinion)(E.D.La. 1978), did the Court order these schools be completely integrated.

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[7] Despite the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954), school boards throughout the state refused to desegregate in the absence of a court order. Cf. *Major v. Treen*, 574 F.Supp. at 340.

[8] Plaintiff's witnesses, Charles and Verta Mar, lifelong residents of Gretna, testified to the grinding details of everyday life in a segregated system for blacks. Segregation on buses, for example, was enforced with a screen backwards, the black passengers had no choice but to relinquish their seats. Water fountains, restrooms were not only frequently in deplorable condition. Mrs. Mar testified that blacks had to enter restaurants from the rear and were prevented from physicially entering certain stores. If they wished to make a purchase, they were forced to use an exterior window. Parks in the city were segregated and swimming pools were kept segregated until 1973.

Plaintiffs' historian, Dr. Raphael Cassimere, testified that throughout the years of separate school systems, facilities and instruction provided to black children were qualitatively inferior to those provided to whites. Blacks were forced to attend Renwald High School in Marrero which was not only substandard but also uncertified, which meant that its graduates had extreme difficulty in getting into college.[9] In contrast, white students attended an accredited high school within the City of Gretna.

Due in part to the segregated pattern of public education and the general inferiority of *de jure* segregated black schools, the legacy of this system persists even today in Gretna. While a majority of whites over age 25 possess a high school education (54%), only 40% of blacks over age 25 are high school graduates.

Black citizens of Gretna have historically suffered disadvantages relative to white citizens in public and private employment, due in some measure to inadequate education. Blacks generally suffer higher incidences of unemployment and hold lower paying jobs than do whites. In 1960, the median family income for whites in Gretna was $18,524. For blacks, the median income was $9,721, only 52% of the median family income for whites. Only 9.7% of whites in Gretna lived below the poverty line but 34.1% of blacks lived below the poverty level. In 1979, 5.5% of all whites over 16 in the labor force in Gretna were unemployed. For blacks, the figure was 13.3%, more than double that of whites.

Similarly, city hiring patterns underline and perpetuate racial discrimination in Gretna. Despite a 28%

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[9] Mrs. Mar testified that instead of continuing at Rosenwald she commuted to an Orleans Parish School—a two hour commute each day.

black population, only 17% of municipal jobs are held by blacks. None of these are supervisory. Moreover, where only 5% of white city employees are classified as laborers, a full 32% of all black employees of the City of Gretna are classified as laborers. The Gretna Police Department has 86 employees, only five of whom, or 5.81%, are black.

Comparatively, residential housing patterns in Gretna, as with other cities and states with histories of *de jure* segregation, have traditionally been separated along racial lines. That pattern persists today in Gretna. Virtualy all residential neighborhoods are racially identifiable. Blacks are consistently concentrated in low income areas and are conspicuously absent from the more affluent areas of Gretna. The evidence presented at trial further shows that the City of Gretna has done little to help alleviate this problem.[10]

*Voting Patterns in Municipal Elections*

Defendants urge that any official discrimination that

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[10] In an effort to counter plaintiffs' evidence concerning the effects of discrimination, defendants called two administrators connected with the federally founded Community Development Office: Emmanuel Brown, the Director of that program for Jefferson Parish, and Paul Richards, Director of Development for Gretna, testified concerning the City's use of federal funds for projects in low and moderate income areas of the city. There testimony was apparently offered to show that the projects helped mitigate the lingering effects of historical discrimination because they had some impact on the black community. However, since defendants admitted that the money comes entirely from the federal government; that defendants are required to target funds in "lo-mod" areas in order to obtain them; that the funds constitute in any one year no more than 6% of the Gretna city budget; that Jefferson Parish and not Gretna has the final say concerning which projects are funded, it is difficult to comprehend what, if anything, such testimony says about Gretna's attempts to better housing and other socio-economic conditions for blacks.

may have existed in Gretna prior to the adoption of the Voting Rights Act in 1965 has not impeded black political participation today and consequently "there is no lingering impact of any past discrimination."[11] The record fails to support this conclusion.

While blacks are registered to vote at a rate equivalent to white residents of Gretna, they constitute a much smaller proportion of the actual electorate participating in aldermanic elections because turnout among black registered voters has been substantially below that of white registered voters. Plaintiffs' expert witness, political scientist Dr. Richard Engstrom, presented the following analysis of turnout in the three most recent aldermanic elections. He testified that while blacks constituted 24.7% of registered voters, in 1981, 1979 and 1977, they comprise respectively only 16.3%, 19.7% and 14% of all participating voters. The differences in turnout rates are 21.7% in 1981 (35.8 percent of registered blacks who turned out to vote against 57.5% percent of registered whites who turned out to vote), and 26% in 1977 (based on a weighted regression estimate of 35.9 percent turnout for blacks and 61.9 percent turnout for whites). Another measure of participation, in aldermanic contests where blacks ran, was to calculate the number of votes for aldermanic candidates cast by members of each racial group as a percentage of the possible number of votes for the alderman that group members could have cast given their registration. For example, in 1981, whites cast 54.6 percent of the votes they could have case, but blacks cast 18.4 percent for a difference of 36.1 percent. In 1977, whites cast 59.3 percent and blacks cast 26.1 percent of their possible votes for a difference of 33.2 percent. Whether the measure of partici-

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[11] Defendants' Post Trial Brief at 9, paragraph 38.

pation is simply turnout at the election or the percentage of possible aldermanic votes cast, substantial differences in participation rates consistently appear in the aldermanic elections in Gretna.[11] Thus it is axiomatic "when minorities are faced with almost total exclusion from the ordinary channels of political participation and deprived of any alternative means of exerting influence, their voter turnout and candidacy rates tend to drop." *See,* Minority Vote Dilution 15 (C. Davidson ed. 1984).

Of all the socio-economic factors treated in the above findings, the status of black citizens as a group is lower than that of white citizens as a group. This is true throughout Jefferson Parish, and it is true with respect to the City of Gretna. This lower socio-economic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking

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[12] Plaintiff's expert historian, Dr. Cassimere, offered one of several possible answers for lower black turnout in aldermanic elections. Dr. Cassimere testified that elected chief's of police in Louisiana towns and cities are perceived generally by black communities to be extremely powerful. The Police Chief in Gretna, Beauregard Miller, was Chief from 1925 up until his death in 1976, when his son Beauregard Miller, Jr. was appointed to replace him. Miller, Jr. was elected Police Chief the next year and remains in office to this day. Mr. Mar testified that the Millers were perceived by the black community as "power." "We knew no Board of Aldermen, no Mayor," he said. In his mind and in the minds of other winesses, the Chief was the government. Dr. Cassimere explained that the apparent right to freely arrest makes the chief and the police organization especially fearsome to the black community, which, lacking the education to know its rights, perceives correctly that its members are powerless in the hands of the police. Mr. and Mrs. Mars testified that the perception of the Miller control of the City remains current in the black community and that while they always voted in state and national elections, they rarely vote in most municipal elections because of the perceived futility of their vote.

government's awareness of and attention to those interests.[13]

Both Congress and the Courts have recognized the effect ower socio-economic status has on minority participation in the political process. The Senate Report states:

> "The courts have recognized that disproportionate educational[,] employment, income leverl[,] and living conditions arising from past discrimination tend to depress minority political participation . . . . Where these conditions are shown, and where the level of black participation is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation."

1982 Senate Report at 29 n. 114, U.S.Code Cong. & Adm.News 1982, p. 207. *Se also, Major v. Treen*, 574 F.Supp. 325, 351 (E.D. La. 1983).

In sum, the depressed levels of income, education and employment are a consequence of severe historical disadvantage. Depressed levels of participation in voting and candidacy are inextricably involved in the perception of futility and impotence such a history engenders. These historical disadvantages continue through the present day and undoubtedly hinder the ability of the black community to participate effectively in the political process within the City of Gretna.

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13 "Section 2 claimants are not required to demonstrate by direct evidence a causal nexus between their relatively depressed socio-economic status and a lessening of their opportunity to participate effectively in the political process." *Gingles v. Edmisten*, 590 F.Supp. 345, 363 (E.D.N.C.1984), n.23; S.Rep. No. 417, 97th Cong., 2d *Sess.* 193 (1982), U.S.Code Cong. & Adm.News 1982 p. 177.

*The Extent of Election of Black Citizens to Public Office*

It appears from the record that no black person has ever been elected to municipal office in Gretna. Indeed, in the entire history of Gretna, only two black persons have run for municipal office (Edwin Romain in 1973 and Leo Jones in 1977 and 1979 for Alderman). This is in distinct contrast to the white community which, despite the overwhelming success rate of the Miller-White factions,[14] turns out a large group of candidates for municipal elections. In 1973, thirteen which non-in-cumbent candidates ran for Alderman. In 1977, six white non-incumbent candidates ran for aldermanic office. In 1979, six white non-incumbent candidates ran for one seat against a seventh with strong Miller-White identification indicia.

[2,3] Where members of the minority group have not been elected to public office, it is of course evidence of vote dilution. *U.S. v. Marengo County Comm'n.*, 731 F.2d 1546, 1571 (5th Cir.1984). Section 2(b) explicitly permits the court to consider "[t]he extent to which members of a protected class have been elected," but in the next breath warns that the statute does not establish a right to proportional representation, 42 U.S.C.A § 1973(b) (West Supp. 1983). Less than proportional representation does not automatically violate Section 2. However, the election of even one or a small number of minority elected officials will not compel a finding of no dilution. *Id.* at 1572.[15] As Judge Gewin cautioned in *Zimmer v. McKeithen*, 485

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14 *See*, p. 1122, *infra*.

15 *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) specifically notes:

"Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success migh be attributable to political support motivated by different

F.2d 1297, 1307 (5th Cir. 1973):

> "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record."

So too, this case requires the Court to make an independent consideration of the record.

As noted earlier, no black person has ever been elected to the Board of Aldermen of Gretna since its incorporation in 1913. Nevertheless, defendants argue black citizens have elected dandidates of their choice to the Board of Alderman with regularity because Gretna's white officials have always received a significant portion of the black vote and the support of Gretna's black political organizations.[16] That argument is spurious at best—and at the very least calls to note an anecedote once attributed to Henry Ford. The author notes:

> "At first it was possible to buy Model T Touring cars that were painted red and roadsters that were painted gray, but in mid-1909 under pressure to build as many cars as possible, the color for all Model T's became dark green with black trim and red stripping. In 1912, with

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(Footnote 15 continued)
considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds." *Id.* at 1307. *Se also, National Association for the Advancement of Colored People v. Gadsden County School Board*, 11 Cir. 1982, 691 F.2d 978, 983.

> demand for the car still rising and the urgent need for even greater standardization and simplification, Ford made this famous statement, 'Any customer can have a car painted any color he wants so long as it is black.' Thereafter, only black cars poured out of the Highland Park factory."

Barry, James P. *Henry Ford and Mass Production*, 55 (Franklin Watts, Inc., New York, 1973).

Implicit also within defendants' assertion that black voters in Gretna have elected candidates of their choice is the suggestion that at least one of the two black candidacise—that of Leo Jones—was simply token because he was not endorsed by two local black political organizations—the Westside Citizens' Committee and the Black Caucus, in 1977 or 1979. A review of the record and the campaign for these periods does not support such a finding.

In the 1977 aldermanic election, Jones completed with 11 white candidates. All the candidates including Jones, were registered Democrate.[17] His overall vote of 1,159 left him in ninth place in the balloting, 1,943 votes behind the candidate who was ultimately elected. In the 1979 special election, held for a single seat, Jones competed against seven white candidates. His overall vote of 756 (13.3% of the total vote) left him a distant fourth in the election. The two leading condidates who were forced into a runoff received 1,544 and 1,430 votes, 788 and 674 more votes, respectfully, than Jones.

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[17] Thus, party identification was not a factor in the 1977 election.

The Court finds that Jones was a viable and legitimate condidate with considerable name recognition in both the 1977 and 1979 elections. His campaign expenditures in those elections were roughly equivalent to the other candidates, including the winners. For example, Jones testified that he spent $1,500 and $2,500 in 1977 and 1979, respectfully. All candidates in both electionns with the exception of Kate Ward[18] and Salvadore Marchese filed affidavits with the State attesting that they had spent under $5,000 in campaign expenditures. The winner of the 1979 election, Salvadore Marchese, filed an affidavit evidencing expenses of $2,633 for the primary election.

The record also shows that Jones was an active campaigner as well.[19] In both campaigns, he printed thousands of cards and yard signs which he distributed as he campaigned.[20] In the 1977 campaign, Jones offered himself to the voters as a leader with experience in government (former deputy sheriff with the Jefferson Parish Sheriff's Department) and civic groups (executive director of the Park Village Civic Organization).[21] His platform included advocating, among other things, Civil Service for all city employees, advertising for bids on all city contracts in the official journal, providing a system of large and small fully equipped playgrounds using a Bloc Grant and other federal funds, and the revitalization of the Central

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[18] Ms. Ward filed an affidavit listing campaign expenditures of $12,184.00 for 1977.

[19] Jones was a frequent contributor to the local newspaper, the West Bank Guide. By the time of the October 27, 1979 primary election, Jones had published seven letters to the Editor on isues relevant to the electors.

[20] The cards contained Jones' picture, his name and his ballot number as well as statements about his political activity.

[21] See. Plaintiff's Exhibit P-13.

Business District with the cooperation of business and industry.

Jones testified that he campaigned vigorously in every precinct in both elections, going from house to house and covering at least 80 percent of the houses with registered voters which he estimate to be about 2,400 households. He testified that he took from work for the race and campaigned heavily on evenings and weekends. For the 1977 election, he campaigned for two months. Indeed, for the 1979 aldermanic race, Jones was the first candidate to announce his candidacy in the local newspaper. He testified that he campaigned for three months actively in both predominantly black and predominantly white neighborhoods of Gretna.[22]

Thus, the failure of one black candidate to receive the endorsement of a particular black political organization, while it may have demonstrated that some white candidates received black support, certainly does not suggest that his candidacy was a token one. The endorsement by these organizations might, on occasion, be attributable to political support motivated by different considerations—namely, that there is little optimism that a black could win an election under Gretna's current aldermanic election scheme. The fact remains that despite the strong candidates of two qualified blacks on three separate occasions, no black has ever won an aldermanic election. This evidence can be interpreted only as strong evidence of dilution.

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[22] The other black candidate for Alderman, Edwin Romain, who ran in 1973, also campaigned strongly for the 1973 aldermanic election. He was endorsed by the West Side Citizens Committee. In the primary election, Romain finished sixth out of seventeen candidates, high enough to qualify him for the runoff election. however, in the runoff, he finished last in the race.

*Access to the Slating Process*

"In jurisdictions where there is an influential official or unofficial slating organization, the ability of minorities to participate in that slating organization and to recieve its endorsement may be of paramount importance." *U.S. v. Marengo County Commission*, 731 F.2d at 1569. Politics in the City of Gretna is characterized by a constant reference to an informal group of elected officials known as the "Miller-White Ticket." The Millers, father and son have been consecutively Chief of Police for a period of 60 years without interruption. Beauregard Miller, Sr. became Chief in 1925 and served for 50 years until his death in 1976. His son, Beauregard, Jr., was appointed at his death and elected Chief in 1977. William White has been mayor of Gretna since 1951, a total of 34 years.

There exists some controversy among the parties as to whether in fact the Miller-White faction is in fact a slating group. Defendants object to plaintiffs' characterization of the "Miller-White Ticket"as a slating group. Rather, they argue, "it is an endorsement group, since it does not recruit candidates for office and/or run endorsed candidates as a slate."[23] Moreover, defendants urge, the "Miller-White Ticket" is not affiliated with any political organization; nor does it consider itself as representative of any formal group. However, whether in fact the Miller-White Ticket is nonpartisan is of little importance in determining whether it is a slating group. Indeed, a nonpartisan slating group has been defined as "an organization whose purpose is to recruit candidates, nominate them, and campaign for their election to office in

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[23] *See*, Defendant's Post Trial Memorandum, p. 29. Testimony of Dr. Wilgen.

a nonpartisan election system."[24] However, what is important, and quite evident from the record, is the fact that although no formal recruting process exists, there does exist a more informal slating process which generally ensures a white candidate for every office. Plaintiff's have presented, very cogently and convincingly, evidence that the black community has been effectively excluded from the informal slating process that is carried on in Gretna. Aldermen Uzee and Edwin Romain testified that in 1973 when there were two aldermanic seats open, a meeting was held in a local restaurant, to which all non-incumbent candidates were invited except, Mr. Romain, the black candidate. Chief Miller, Sr. chaired the meeting; he offered the endorsement of the Miller-White group to all candidates who would endorse the rest of the Miller-White Ticket.[25] A few of the white candidates accepted the offer and were

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[24] *See, Minority Vote Dilution* at pg. 119. Black Law Dictionary defines a slate as simply "[a] list of candidates for public office or for positions on board of directors." *Id.* at pg. 1245. In *Minoritty Vote Dilution* the authors caution against misconstruing the term "nonpartisan" when discussing the nature of a particular slating group. They note:

> "it should be said at the outset that the term nonpartisan in this context is misleading. Students of nonpartisanship have long been aware of its ambigous meaning. On the one hand, it refers to a system in which candidates party afiliation is absent from the ballot. 'Ballot nonpartisanship' in this sense must be distinguished from systems of participatory nonpartisanship' in which political parties are not involved in campaigns. Obviously ballot nonpartisanship is entirely compatible with participatory partisanship as when the Democratic and Republican county committees either formally or informally work in behalf of a local candidate whose party affiliation is not on the ballot. In other words, it is possible to have 'party politics' in a system of ballot nonpartisanship".

*Id.* at 120.

[25] The ticket included, among others, Miller for Chief and White for Mayor.

invited to a second meeting the next day to be interviewed by Mayor White. Two were chosen to run with the Miller-White Ticket: Mr. Uzee and Mr. Bush. These two were elected and serve to this day on the Board of Aldermen.

Salvadore Marchese, winner of a 1979 special aldermanic election, testified that the first time he ran the Miler-White Ticket endorsed no one. On cross examination, however, when confronted with his own campaign advertisement endorsing Miller for Chief of Police, he admitted that his campaign did receive some support from the Miller-White faction.

As a factual matter, blacks in Gretna are completely excluded from representation on the Miller-White Ticket. It is extremely difficult to win an aldermanic election without the Miller-White endorsement.[26] Indeed, defendants have admitted that each time the Miller-White faction has endorsed a candidate for the Board of Aldermen, that candidate has won. The black candidate, Edward Romain, testified he approached several of the incumbent aldermen seeking their support in 1973. He as told that the person to see was Chief Miller. When he spoke to Chief Miller he was informed that he could not be on the slate, that he was not needed to get the black vote. Thus, Miller refused to endorse Romain despite the fact that Romain had considerable suppport in the black community, including the endorsement of the West Side Citizens Committee.

While is is true that some members of the Miller-White Ticket do receive support from the black community, the opposite is not true. That is to say, there is no

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[26] There are some white candidates who have in more recent years won election without the Miller-White endorsement; however, not without some difficulty and costly efforts.

evidence to show that blacks have any choice in determining what issues or candidates should or should not be endorsed by the Miller-White Ticket. If participation is to be labeled "effective" then it certainly must be a matter of right, and not a function of grace. *See. Graves v. Barnes,* 343 F.Supp. 704, 726, *affd. in White v. Register,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.23d 314 (1973). Evidence presented at trial clearly show that the black community in Gretna participates in the slating process in only a minimal and indirect measure.

*Enhancing Factors*

A vote dilution case "is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts". *Zimmer,* 485 F.2d at 1305.

The Court finds that the entire voting population of the City of Gretna constitutes an unusually large election district for the purposes of electing the members of the Board of Aldermen. Gretna is the largest city by population in Louisiana that elects its governing body at large. With a population of 20,615 persons, the city is 4,501 larger in population than the next largest city in Louisiana that elects its governing body at-large (Morgan City at 16,114 persons). In Louisiana, over 90 percent of the municipalities with governing authorities elected at large have populations under 4,123.

Gretna's elections in general are governed by the Louisiana Election Code, LSA-R.S. 18:1 *et seq.* Gretna has a majority vote requirement for election to office. The number of votes required to elect candidates in Gretna is determined by LSA-R.S. 18:511, which provides in rele-

vant part:

> A. *Majority Vote.* A candidate who receives a majority of the votes cast for an office in a primary election is elected. If there are two or more offices of the same character to be filled, the number of votes necessary to constitute a majority shall be greater than the result obtained by dividing the total votes cast for all of the candidates by the number of offices to be filled and dividing the result so obtained by two. If more candidates receive a majority than there are offices to be filled, those of such candidates receiving the highest total of votes shall be elected, to the number required to fill all of the offices.

Plaintiffs' expert, Dr. Engstrom, has correctly explained that the statute creates a "sliding minimum vote requirement," that is a type of majority vote requirement. Dr. Engstrom has properly termed it "sliding" because it is possible, using the required formula, for a candidate to have obtained more than fifty percent of the votes and still not have met the minimum vote required to be elected. It is also possible for a candidate to obtain somewhat less than a majority and still meet the minimum vote requirement if a great many voters vote for fewer than the available seats.[27]

The general effect of Gretna's majority vote requirement, because it requires more than a simple plurality, is to make it less likely that the candidates of any identifiable voting minority will ever win elections. This generally adverse effect on any cohesive voting minority is enhanced

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[27] There are no prohibitions against single-shot voting in Gretan. LSA-R.S. 18:522. That is, there is no requirement that voters vote for a full slate of candidates on the ballot.

if racial polarization in voting patterns also exists. Accordingly, the Court finds that the majority vote requirements act as a continuing practical impediment to the opportunity of blacks in Gretna to elect candidates of their choice.

*Racial Polarization in Voting*

Statistical evidence presented by duly qualified expert witnesses for plaintiffs and supplemented to some degree by direct testimony of law witnesses, establishes that racially polarized voting in the City of Gretna, Dr. Richard Engstrom and Professor Michael McDonald,[28] duly qualified expert witnesses for plaintiffs, collected data

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[28] Sometime after the hearing of this case, Michael McDonald notified the Court through plaintiffs' counsel, that though his testimony given in court may have led the Court to believe he had received the Degree of Doctor of Philosophy (Ph.D.), in fact he had not received such a degree. In a prepared affidavit, McDonald noted that while he had passed all requirements for the Ph.D., including a successful defense of his dissertation, he had not completed the formal submission of the final form of dissertation for administrative purposes. Upon learing of this, plaintiffs have moved the Court to requalify Michael McDonald as an expert. Defendants do not object to Professor McDonald's requalification.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although Professor McDonald at the time of trial did not hold a Ph.D., Federal Rules of Evidence 702 does not require the possession of a Ph.D, to qualify an expert. The language of the rule is such that experience, training, and education are items the Court may consider in its determination of whether a witness qualifies as an expert. McDonald's affidavit attests to the fact that he has spent eight and one-half years continued.

from every election in which Gretna voters had the opportunity to vote for a black person focusing attention mainly on the 1977 and 1979 aldermanic elections. Based upon two complementary methods of analysis of the collected data—correlation and regression analysis and homogenous precinct analysis[29]—combined with a related descriptive analysis to test for a mistaken inference, Drs. McDonald

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(Footnote 28 continued)
since 1977 working as a professional political scientist. He has worked exclusively as a university level teacher and researcher in the Political Science Departments at the University of New Orleans (U.N.O.) and currently at the State University of New York-Binghamton. His teaching responsibilities include the areas of legislative politics and data analysis for politics and policy. Along with teaching, he has also conducted research concerning representatational politics and data analysis. He has also published three scholarly articles, co-authored with Dr. Engstrom, concerning black representation in the electoral structure which have received strong praise and acceptance in the political science field.

Other relevant aspects of his work include the data analytic task performed for Section 2 litigation in jurisdictions other than Gretna. McDonald attests and the Court accepts that he has been involved in the data base preparation, computer program writing, and data analysis for Section 2 litigation in: (1) Norfolk, Virginia—heard and decided; (2) Sarasota, Florida—heard and decided; (3)Blytheville, Arkansas—settled out of court; (4) Yonkers, New York—settled out of court; (5) New York City, New York—heard and decided; and (6) Washington County, Mississippi.

In sum, the Court finds that Professor McDonald's professional career suggested an ability to perform capably in assisting the Court's interpretation of evidentiary questions concerning the patterns of racially polarized voting in Gretna. Accordingly, a review of McDonald's affidavit as well as the attached articles show that he is overwhelmingly quanified by knowledge, skill, and training to be an expert in this area.

[29] Dr. Engstrom and Professor McDonald have appropriately noted:

> "Two analytic procedures for estimationg the magnitude of group differences have been commonly relied upon by the expert witnesses in vote dilution cases. One approach is simply to examine levels of participation and voting behavior

and Engstrom summarized, and the Court concludes for reasons which follow, that within each of the elections analyzed, racial polarization existed in a significant degree.

*Quantitative Evidence*

Although election returns are available as far back as 1960, statistics on registration and turnout by race and precinct are only available after 1975 for Gretna. Therefore, of the four elections in which blacks ran for alderman, only two were capable of quantitative analysis: the elections of 1977 and 1979.

Voters in Gretna vote in 13 precincts, the boundaries of which are set by parish ordinance. Three of the 13 precincts in the 1977 and 1979 elections were homogeneous white precincts with populations of ten or fewer black voters.[30] Four of the precincts have less than ten percent registered black voters. They are Precincts 4 and 4A of Ward 1, Precinct 3 of Ward 2, and Precinct 1 of Ward 3. Two of the precincts (Precincts 3 and 3A in Ward 1) have

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(Footnote 29 continued)
within "homogeneous" precincts of a particular political jurisdiction. Homogeneous precincts are those in which all or almost all of the potential voters are members of the particular racial or language minority group. The other approach is to utilize a more general statistical procedure known as correlation and regression analysis. The major advantage of this approach is that information about voting behavior in all of the precincts in a political jurisdiction, or some specific geographical area, is incorporated into the analysis."

*See*Note, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting,* 17 Urban Lawyer, 369, 371 (1985)

[30] Precincts are considered to be homogeneous if over 90 percent of the population, voting age population, or registered voters (depending on which data are available) residing in the precinct are members of the minority group; or conversely, less than 10 percent are members of the minority group.

had a majority black polulation at least since 1979.

Analysis of the 1977 and 1979 election returns precinct by precinct reveals that while black voters are estimated to have voted for the black candidate at a rate of 60 to 67 percent, white voters were estimated to have voted for black candidates at a rate which ranged from a low of .9 percent (less than one percent) to a high of 12 percent.

Since there were so few aldermanic elections in which major black candidates ran, plaintiffs' experts analyzed the other five elections in which Gretna voters had the opportunity to vote for a black candidate.[31] In the four elections capable of quantitative analysis, the following percentages of black and white voters voted for the inidcated black candidate:

| Election | White (%) | Black(%) |
|---|---|---|
| 1984 - Jackson | | |
| * Unweighted | 1.6 | 95.5 |
| * Weighted | 1.7 | 95.3 |
| 1979 - Jeffers | | |
| Unweighted | 7.5 | 70.1 |
| Weighted | 7.9 | 70.1 |
| 1979 - Jones | | |
| Unweighted | 1.0 | 60.1 |
| Weighted | 0.9 | 65.7 |
| 1977 - Jones | | |
| Unweighted | 11.2 | 65.1 |
| Weighted | 12.0 | 67.2 |

* The term "unweighted" as used here means that each percinct in Louisiana was treated as an equal unit in determining these values, regardless of the actual number of votes cast in those precincts. The term "weighted" is used to take into account differences in the number of votes across precincts.

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[31] In three of these elections two black candidates, Larry Napoleon

In general, almost 80% of white voters did not vote for any black candidates in these five elections.

Plaintiff's experts testified at some length concerning their methods of analysis—Homogeneous Precinct Analysis and Correlation and Regression Analysis. Since expert witnesses rarely rely solely on homogeneous precinct analyses to estimate the differences in voter participation and preferences, and because estimates of group differences in voting behavior can be derived from this procedure without homogeneous precincts being present, the Court will discuss plaintiffs use of Correlation and Regression Analysis first. See generally, note, *Multiple Regression in Legal Proceedings,* 80 Col.L.Rev. 702 (1980).

*Correlation and Regression Analysis*

Correlation and regression analsis is used to determine the degree of relationship between two variables, such as the racial composition of the precincts in a city or district and the electoral support provided a particular candidate or group of candidates within those precincts. The independent variable in the analysis is a summary measure of the race of the voters in each precinct usually the percentage of blacks among the total population, voting age

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(Footnote 31 continued)
Cooper and Sylvester Brown, drew so little voter support from blacks or whites that they were not included in the analysis. (Cooper, who ran twice, once for Lieutenant Governor and once for Senator, is apparently a fringe candidate, and Sylvester Brown withdrew before the election was held.) The other two elections were the 1984 presidential primary in which Jessee Jackson ran and a 1979 race by Ben Jeffers for Secretary of State of Louisiana.

population, or registered voters). the dependent variable is the percentage of voters in each precinct casting ballots for the specific candidate or group of candidates. Correlation and regression analysis provides statistical coefficients that summarize the consistency and strength of the relationship between the two variables.[32]

Plaintiffs' experts demonstrated that they were keenly aware of criticism that has been leveled at statistical analyses of racial polarization, coming mainly from Judge Higgenbotham in *Jones v. City of Lubbock, Texas,* (special concurrence), 730 F.2d 233 (5th Cir.1984).

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[32] The correlation coefficient, which is reported as "r," is a measure of how consistently the scores for a dependent variable (the percentage of voters supporting the black candidate) vary with the independent variable (the black proportion of the voting age population. Both plaintiffs' experts testified that if the percentage of voters supporting a candidate or a group of candidates in the various percincts tends to increase as the black percentage of the voting age population in these precincts increases, then there is a positive relationship between the two variables. Thus, if the percentage of voters supporting a candidate or group of candidates tends to decrease as the black percentage of the voting age population increases, then the relationship is negative. The more consistent the tendency, the greater the magnitude of the correlation coefficient. the value of "r" can range from ' 1.0 (a perfectly consistent positive relationship) through 0.0 (no relationship) to - 1.0 a perfectly consistent negative relationship).

A second coefficient, the one that illuminates the degree to which voting patterns are racially differentiated, is the unstandardized regression coefficient, commonly reported as "b." This coefficient provides an estimate of how strongly two variables are related; that is, to what extent the scores for a dependent variable can be expected to change in response to changes in the scores for an independent variable. Whereas the correlation coefficient summarizes how consistently the electoral support for a candidate or group of candidates varies with the race of the voters in the precincts, the regression coefficient estimates how much that support varies with the racial composition of the precinct electorates.

They do utilize the "r" factor, which is the statistic complained of by Judge Higginbotham, to provide a measure of how consistently the percentage of votes received by the black candidate varies with the percentage of voters who are black, but they also utilized a "b" factor which illuminates the degree to which voting patterns are racially polarized to *how much* the support for the black candidate varies with the racial composition of the electorate. Thus an "r" reading which approaches 1 shows that the correlation between an increase in the number of black voters and votes for the black candidate is very consistent. the "b" reading shows how much with every one percent increase in the percentage of black voters, the vote for the black candidate increases. The experts explained, they then find the standard error of the "b" to determine the degree of confidence. If the standard error of the "b" is at least twice the "b," the "b" is considered to be a reliable estimate. thus, if the "white voters split their vote 50-50," the "b" figure would correct the impression of high correlation which would show up in the "r" if "the minority voters voted as a bloc." *See Jones,* 730 F.2d at 235. the experts also derive their estimates of percentage of black and white voters voting for the black candidate from the same regression analysis. (See Plaintiffs' Exhibit 64 attached.)

Using charts (Plaintiffs' Exhibits 59 and 63), plaintiffs' experts have very carefully demonstrated to the Court how correlation and regression and analysis is applied to the 1977 and 1979 aldermanic elections, respectively. Within plaintiffs' Exhibits 59 and 63), plaintiffs' experts have very carefully demonstrated to the Court how correlation and regression analysis is applied to the 1977 and 1979 aldermanic elections, respectively. Within plaintiffs' Exhibits 59 and 63, the independent variable reflected on the horizontal axis is the percentage of the voting age population (reflected as "Adjusted Black % of Registered

Voters for 1977), which is black in each of Gretna's thirteen precincts. The dependent variable, reflected on the vertical axis, is the the percentage of voters in each of the precincts who voted for Jones. Every precinct in the City (depicted by triangles) is located within the figure (called a scatterplot) according to its scores on these two variables. As recorded on the scatterplot itself, the value of the correlation coefficient for Jones' vote in 1977 and 1979 is .926 and .963, respectively; that is, an almost perfectly consistent pattern existed in which the percentage of voters supporting Jones increased as the black percentage of the voting population increased.

Whereas the correlation coefficient summarizes how consistently the electoral support for a candidate or group of candidates varies with the race of the voters in the precincts, the regression coefficient"b" estimates how much that support varies with the racial composition of the precinct electorates. In plaintiffs' Exhibits 59 and 63 (see attached), the value of "b" is the slope of the line that has been drawn through the points in the scatter plot. Plaintiffs' experts explained that this regression line is the straight line that fits the points (or triangles) the best, meaning no other straight line could be drawn such that the combined distances or deviations between each of the points and the line would be less than they are for these regression lines. The slope of the regression line provides an estimate of the strength of the relationship between the two variables; the greater the slope, the stronger the relationship.

The "b" for the relationship depicted in the 1977 election is .539. Based on this regression line, it is estimated that every increase of 1.0 percent in the black portion of the voting population across precincts tended to result in a .539 increase in the percentage of voters support-

ing Jones. In other words, if the black proportion of the voting population in one precinct was 50 percertage points higher than in a second precinct, the percentage of voters supporting Jones in that precinct would be expected to be about 27 percentage points higher (50 X .539) than in the second precinct. The correlation and regression coefficients for this example demonstrate that the electoral support for Jones across precincts in Gretna in 1977 was strongly and consistently related to the racial composition of those precincts.[33]

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[33] The same arithmetic can be done for the 1979 election (50 X .590 = 29.5) to show that the black proportion of the voting population was 50% points higher than in a second precinct, the % of voters supporting Jones in that precinct would be expected to be about 29.5 percentage points higher than in the second precinct.

The regression line in the 1977 and 1979 aldermanic charts not only provides an estimate of the strength of the relationship between the variables, it also can be used to provide estimates of the actual percentages of black and non-black voters supporting any particular candidate or group of candidates. These estimates are based on "intercepts," the points at which the line crosses the left and the right vertical axes of the scatterplot. The left intercept provides an estimate of the percentage of voters supporting a candidate in a precinct in which no black people would have voted, while the right intercept provides an estimate for a precinct in which only blacks would have voted. Intercepts allow one to compare ( as was done through homogeneous precinct analysis) the percentage of both minority group voters and nonmimority group voters favoring a particular candidate. The values of the intercepts reported in the 1977 election suggests that Jones received the votes of only 0.1 percent of the voters in Gretna who were not black, while he was supported by 65.1 percent of those who were black.

The values of the correlation coefficient, regression coefficient, and intercepts reported in the 1977 chart are based on "unweighted" correlation and regression, meaning each precinct in Gretna was treated as an equal unit in determining these values, regardless of the actual number of votes cast in these precincts. This type of analysis can also be "weighted" to take into account differences in the number of voters across precincts, so that the influence each precinct has on the values

*Homogeneous Precinct Analysis*

Dr. Engstrom and Professor McDonald then proceeded to subject their analysis to the second step in their method—homogeneous precinct analysis. The conclusion that Mr. Jones received only a small proportion of the votes cast by whites in the 1979 elections is corroborated by an investigation of the votes cast in the homogeneous white precincts. In 1979, no black person voted in Precinct 4A of Ward 1, only one black person voted in Precinct 3 of Ward 2, and only two blacks voted in Precinct 1 of Ward 3. Of the 1,458 votes cast for aldermanic candidates across these three precincts, the black candidate received 22 or 1.5 percent. In each of the precincts that were homogeneous and white in 1977 (Precincts 4 and 4A in Ward and Precinct 1 in Ward 3), a total of 13 blacks were registered to vote. Jones finished last among the twelve candidates.

Although there are no homogeneously black precincts in Gretna, a separate analysis of the vote in the two majority black precincts (Precincts 3 and 3A in Ward 1) supports the conclusion that in 1979 the black candidate received over 60 percent of the votes cast by blacks. In these two precincts, 759 people turned out to vote in 1979, 482 of whom (63.5 percent) were black. Six hundred forty-two voted in the aldermanic contest. Assuming that each racial group "rolled off" at an equal rate, and that the white crossover vote for the black candidate in these two precincts was the same as the city wide estimate (1.0 percent), then Jones is estimated to have received 2 of the 238 votes cast by whites in these precincts and 273 of the 414 votes cast by blacks, or 65.9 present of the black vote.

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(Footnote 33 continued)
of the summary coefficients varies by the size of the vote cast within that precinct. See, Plaintiffs' Exhibit # 64 for results of regression analysis in the 1977 and 1979 aldermanic elections.

*Additional Proof*

Generally, where the results of the regression analysis are confirmed by a separate investigation of the homogeneous precincts, that is where the "b" indicates the strength of the increase, the "r" confirms the consistency of the increase, and the standard error of the "b" is at least twice the "b," no further investigation is necessary. No data have appeared to suggest that the inferences made are incorrect. Nonetheless, Drs. Engstrom and McDonald performed a further analysis to determine whether a mistake could have been made in their regression analysis by perhaps infering incorrectly from aggregate data to describe individual behavior (such as particular voting decisions). Such incorrect inferences are said to suffer from the "ecological fallacy," another subject cautioned againsst by Judge Higginbotham. However, plaintiffs' experts also considered a series of Census Bureau charts and tapes on income and education data relating to the three homogeneous white precincts, 4A in Ward 1, 3 in Ward 2, and 1 in Ward 3.[34] Precinct 4A in Ward 1 turned out to be coterminous with a block group for which extensive data was available. Plaintiffs' experts were able to conclude that although there was a wide range of income levels in Precinct 4A, it clearly contained the most affluent sections of the city. Precinct 3, Ward 2 provided data which in Dr. McDonald's esstimate suggessted a middle level income area. That is, not very many poor families show up in the income range data, but there are no families with incomes above the $50,000 bracket. For Precinct 1, Ward 3, Dr.

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[34] Data from the Census Bureau is frequently only availabale in block level groups which may or may not be the same geographical shape as the precinct would appear on a map.

McDonald studied housing and rental data as well as family income. He concluded that this last precinct was a distinctly low income area. Thus, he concluded that the homogeneous white precincts could be classified as poor, middle class and affluent. Despite their differecnce, the white population of these three precincts had one thing in common. Virtually no one voted for the black candidate. From this, the experts concluded that there was no reason to assume that whites in the mixed precincts had behaved any differently from whites in the homogeneous precincts.

In conclusion, plaintiffs' experts analyzed voting to determine if it was popularized by using a bi-variant regression analysis. By using computers, they studied percentages of black voters who voted for the black candidate and precinct size. Their analysis of various kinds of income was descriptive, not quantitative. It was their testimony that racial polarization is a concept in political science which describes a situation where, for whatever reason, blacks are voting one way and whites are voting another. To determine that such a pattern was occurring is properly the task of bi-variant regression analysis.

Defendants, in an effort to rebut plainitffs' claim that voting in the City of Gretna was racially polarized, relied heavily, if not exclusively, on the testimony of Dr. John Wildgen, a political science professor at the University of New Orleans, who was qualified by this Court as an expert in computer applications, political behavior and comparative politics. Dr. Wildgen concluded that Gretna's "at-large" system of electing aldermen did not result in a dilution of black voting strength. He concluded the Gretna's elections are not characterized by racial polarization.

Notwithstanding the fact that no black person has ever been elected to alderman, Dr. Wildgen contends that

the elections in which blacks of Aldermen were not characterized by racial polarization. The evidence clearly belies such a contention.

In earlier studies on voting behavior in Orleans Parish, "The City of New Orleans' 1976 Elections." and "A Political Problem of Public Education in New Orleans," Dr. Wildgen, employing the statistical tools of bivariant regression analysis, concluded that racial polarization existed amongst the voters in New Orleans.

Contrary to previous publications and testimony, Dr. Wildgen now contends that regression analysis is imappropriate for measuring racial polarization. According to Dr. Wildgen, one must conduct a multivariant analysis taking into consideration not only the registration by race in each precinct and the precinct elections returns, but also, religion, income, media coverage, etc. He also encourages the use of survey data. While multi-variant analysis and survey data may prove helpful in determing whether racial polarization exists, they too are not dispositive on the issue and in no way negate the use of bi-variant regression analysis to determine whether in fact polarization exists.

Race-conscious politics is, as it has been since blacks were allowed to vote, one of the main issues in Gretna politics. Perhaps most teling on the issue of racial polarization is the evidence put forth concerning the campaign of Edwin Romain for the 1973 aldermanic election. In determining whether racial polarization exists in an election scheme, Judge Higginbotham has correctly stated:

> The inquiry is whether race or ethnicity was such a determinant of voting preference in the rejection of black or brown candidates by a white majority that the at-large district, with its com-

ponents, denied minority voters effective voting opportunity.

*Jones v. Lubbock*, 730 F2d at 234 (special concurrence). Judge Higginbotham's inquiry takes on speicial significance when studied in the context of the 1973 aldermanic race. In that election, Romain, a light-skinned black, ran for alderman against 13 non-incumbent white candidates. During the race, a meeting of the candidates was called by Chief Miller to form the Miller-White slate. All 13 white candidates were invited; Romain was not. Romain testified he approached several of the incumbent aldermen seeking their support. He was told that the person to see was Chief Miller. When he spoke to Chief Miller, he was informed that he could not be on the slate, that he was not needed to get the black vote.

Later, Romain testified that he directed considerable campaign effort toward the white residents of Gretna. He testified that he was not known in the white community; that white voters did not realize he was black. Moreover, to enhance his chance of getting white votes, Romain went door to door with his two light-skinned daughters who, he testified, "were the most adapted to white ways." He chose not to campaign with his darker complected sons. He was well received in the white community. In the primary election, Mr. Romain finished sixth out of seventeen candidates, enough to qualify him for the runoff election.

The ploy used by Romain to gain valuable white support for his campaign came to an abrupt end after the primary. A newspaper article was published between the primary and the runoff stating that if elected. Romain would be the first black person to serve on the Board of Aldermen in Gretna. The evidence suggests that this revelation had severe consequences for Romain since his

race had not been previously mentioned by the press. The apparent results of the jolting news was that Romain finished first and second in the majority black precincts and last in every other precinct in the City, to finish last in the race.[35]

In *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 3279, 73 L.Ed.2d 1012 (1982), Justice White, speaking for the Court, observed that "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." There is but one sad and inevitable conclusion; Romain lost for the most part because of his race.

*Ultimate Findings of Fact*

The totality of relevant circumstances found by the Court—lingering effects of years of official discrimination against black citizens in matters touching registration and voting, substantial polarization in voting, a relatively

---

[35] Because of the lack of registration and turnout data prior to 1976, Dr. Engstrom was unable to subject Romain's race to a quantitative analysis. He did look at the results closely and provided a descriptve analysis. In the 1973 election Romain competed with 16 other candidates in the primary election. Two of the five seats in the first primary election, and six candidates, including Romain, competed in a second runoff primary for the remaining three seats.

Mr. Romain's best performance in the first primary was his fourth place finish among the candidates in precincts 3 and 3A in Ward 1, the only two precincts in Gretna in which blacks constitute a majority of the registered voters (at least since 1976). However, when the contest was reduced to six candidates seeking the three remaining positions on the Board, Mr. Romain finished first in precinct 3A of Ward 1, second in precinct 3 of Ward 1, and last in every other precinct in the City. He was therefore last overall. Engstrom concluded that the returns showed a pattern of racially polarized voting in the 1973 election as well. The foregoing analysis confirms Mr. Romain's testimony regarding his election.

depressed socio-economic status resulting in significant degree from a century of both *de jure* and *de facto* segregation, and the continuing effect of a majority vote requirement through use of an "unusually large" election district—results in the submergence of black registered voters in the City of Gretna as a voting minority with members of the electorate to participate in the political process, thereby depriving the black voters of their lawful right to elect representatives of their choice.

## CONCLUSIONS OF LAW

This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331, 1343, 1344, 2201 and 2202.

Plaintiffs seek relief under both the Voting Rights Act of 1965, 42 U.S.C. 1973, *et seq.* as amended, and also under the Fourteenth and Fifteenth Amendments of the United States Constitution.

Although plaintiffs allege both a statutory violation and a constitutional claim, the Section 2 violation must be adjudicated first. *McMillian v. Escambia County, Fla.*, 638 F.2d 1239 (5th Cir. 1981), *vacated*, 466 U.S. 48, 104 S.Ct. at 1577 (1984), *aff'd*, 748 F.2d 1037 (5th Cir. Dec. 19, 1984); *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1478 (11th Cir. 1984); *Major v. Treen*, 574 F.Supp. 325 (E.D.La. 1983). A finding of a Section 2 violation would then obviate the necessity to address plaintiffs' constitutional claims. *Lee County*, 748 F.2d at 1478.

Section 2 of the Voting Rights Act of 1965, as amended provides:

a) No voting qualification or prerequisite to

> voting, standard, practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. 1973.

The "at-large" system of electing aldermen in the City of Gretna is maintained by defendants under color of state law of the State of Louisiana.

> The Voting Rights Act further provides:
>
> b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by section (a) of this section in its members have less opportunity than other members of electorate to participate in the political process and to elect representatives of their choice. . . .

42 U.S.C. § 1973.

The Voting Rights Act was intended to apply to vote dilution cases.[36] *United States v. Marengo County Board of Commissioners*, 731 F.2d 1546, 1556 (11th Cir. 1984).

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[36] The Act applies to any voting practice or procedure which results in discrimination on the basis of race, color or membership in a language minority group, 42 U.S.C. § 1973, amended by Pub.L., No. 97-205, § 3, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973 (West Supp.1983)). See also 128 *Cong.* Rec. S6500 (daily ed. June 9, 1982)(statement of Sen. Stevens, a co-sponsor of the Amendments).

The Senante Report on the 1982 amendment to the Voting Rights Act expressly states that the purpose of the amendment was to eliminate the requirement that plaintiff's prove a discriminatory intent. Instead, the amendment substituted a "results" test based upon a totality of circumstances analysis. S.Rep. No. 1982, 97th Cong., 2d Sess. 15 (1982).

The language of Section 2(b) supplemented by its legislative history provided the standard of proof for finding a Section 2 violation. The Senate Report delineates specific factors in determining whether the Section 2 violation has occurred.

The report lists the factors enunciated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd on other grounds sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam) which articulates the standard *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) established:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot voting provisions, or other voting practices or precedures that may enhance the opportunity for discrimination against the monority group;

4. if there is a candidate slating process, whether the members of the minority have been denied access to that process;

5. the extent to which the members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[37]

The Senate Report makes clear that while factors it lists are often the most relevant considerations, they are not exclusive and thus not controlling. The factors are not "to be used as mechanical 'point counting' device[s]." S.Rep. at 29, U.S. Code Cong. & Adm.News 1982, p. 207. Moreover, a litigant need not prove all, or even a majority, of the factors to establish a Section 2 violation. *Id.* "The failure of plaintiff to establish any particular factor, is not

---

[37] S.Rep. at 28-29, U.S. Code Cong. & Adm. News 1982, pp. 206, 207. The Report indicates two additional factors that in some cases have had probative values as part of plaintiffs' evidence to establish a violation:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> [and]
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or precedure is tenuous. *Id.*

The plaintiff's have not made responsiveness and issue for purposes of this litigation.

rebuttal evidence of non-dilution." *Id.* The relevant factors are only a guide to help the Court determine whether "based on the totality of circumstances . . . the voting strength of minority voters is ... 'minimized or cancelled out.' " *Id. See, United States v. Marengo County,* 731 F.2d 1546, 1567 (11th Cir. 1984); *Gingles v. Edmisten,* 590 F.Supp. 345, 355 (E.D.N.C. 1984)(discussion of polarized voting.)

A finding of a history of official discrimination permits the conclusion that this discrimination contributed to less frequent and less effective minority participation in the political process. *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 3279, 73 L.Ed.2d 1012(1982); *Jones v. City of Lubbock,* 727 F.2d 364, 383 (5th Cir. 1984); *McMillan v. Escambia County, Fla.* 748 F.2d 1037, 1043 (5th Cir. 1984); *United States v. Marengo County,* 731 F.2d at 1567 (11th Cir. 1984). The record in the case at bar clearly supports a finding of a history of official discrimination within the State of Louisiana and the City of Gretna.

Although no factor is indispensible, the legislative history of the amendment to Section 2 indicates that racially polarized voting will ordinarily be the keystone of a dilution case. *McMillan v. Escambia County, Fla.,* 748 F.2d at 1043 (5th Cir. 1984); *United States v. Marengo County Commission,* 731 F.2d at 1566.

Although racial polarization is defined as *beginning* where blacks and whites vote differently from each other in relation to the race of the candidates, it is "the demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests [that] is the linchpin of vote dilution by districting." *Gingles v. Edmisten,* 590 F.Supp. at 355.

Unless it can be shown that an election occurred in which a white candidate ran on issues strongly affecting the black community and with an open, positive and strong identification with the black community— which has not been shown in this matter—candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized.

Indeed every case reviewed by this Court utilized analysis of elections where blacks have run for office to determine whether racial polarization exists. See generally, *Major v. Treen*, 574 F.Supp. 325 (E.D.La. 1983); *Gingles v. Edmisten, supra; Jones v. Lubbock, supra; McMillan v. Escambia County Fla., supra;* and Johnson v. Halifax County, 594 F.Supp. 161 (E.D.N.C. 1984) noting:

> 8. Evidence of racially polarized voting is at the root of a racial vote dilution claim because it demonstrates that racial considerations predominate in elections and cause the defeat of minority candidates or candidates identified with minority interests. *Gingles* described the essence of a vote dilution claim as follows: "primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a radial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racialy polarized in its voting behavior."
>
> In other words, absent racial bloc voting an at-large system would not ensure the consistent defeat of minority candidates or candidates associated with minority interests.

*Halifax County,* 594 F.Supp. at 170 (footnote and citations omitted).

By and large the cases assume that racial polarization begins with mathematical correspondence between race of candidate and race of voters voting for that candidate. When evidence shows persistent patterns of racial bloc voting, courts have found racial polarization or polarized voting. *Major v. Treen,* 547 F.Supp. at 338; *Gingles v. Edmisten,* 590 F.Supp. at 367-372' *Johnson v. Halifax County,* 594 F.Supp. at 166; *McMillan v. Escambia County, Fla. supra.*

The Court concludes as a matter of law that neither Romain's nor Jones' candidacy were token. In demonstrating campaign expenditure, appeal to the white community, campaign strategy, public name recognition and exploring the effect income has on the votes of white persons, plaintiffs have provided the "common sense and intuitive assessment" noted by Judge Higginbotham to show that the black candidates did not run token races. *Jones v Lubbock,* 730 F.2d at 236 (special concurrence).

The "sliding minimum vote requirement" mandated in LSA-R.S. 18:511 and currently in effect in the City of Gretna is a form of majority vote requirement. The effect of this system is particularly egregious since a candidate receiving votes from more than 50% of all the voters may still lose the race. This kind of majority vote requirement tends to dilute the political strength of minority groups. *Jones v. City of Lubbock,* 727 F.2d at 383; *Rogers v. Lodge,* 102 S.Ct. at 3281. In addition to this majority vote requirement, the at-large system of election, with no district residency requirement, serves to effectively destroy the political voice of Gretnas's minority population. See *Rogers v. Lodge,* 102 S.Ct. at 3281; *Whitcomb v. Chavis,*

403 U.S. 124, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363. "Even under the best of circumstances, at-large districts tend to debase the value of a minority's political strength." *Jones*, 727 F.2d at 383. Gretna is the largest municipality within the State to maintain the at-large system. Despite a nearly 30 percent black population, no black person has ever been elected to office in the City of Gretna. This system, coupled with a majority vote requirement and no residency requirement serves to enhance the opportunity for discrimination against minorities in Gretna.

The City of Gretna has a long history of political control by one group—the "Miller-White" Ticket—which engages in an informal process of slating which discriminates against black persons. In jurisdictions where there is an influential official or unofficial slating organizaion and to receive its endorsement may be of paramount importance. In *White v. Regester,* for example, the Supreme Court found it significant that only two blacks had never been endorsed by the Dallas County Committee for Responsible Government, "a white dominated organization that is in effective control of Democratic Party candidate slating in Dallas County." *Marengo* at 1569.

While the Miller-White fraction is unconnected to any official national party, it is in effective control of candidate slating in Gretna. The Miller-White faction is admittedly unofficial, but the *Marengo* court clearly regards that distinction as irrelevant. No blacks have ever been endorsed by the Miller-White group. One black person testified that he had been excluded openly on the basis of his race.

Blacks in Gretna suffer greater socio-economic deficiencies in comparison with whites of discrimination in public and private facilities, education and employment and effects the ability and opportunity of blacks to

participate effectively within the electoral acheme. *McMillan v. Escambia County, Fla.* 748 F.2d at 1044; *Jones v. City of Lubbock,* 727 F.2d at 383; *Gingles v. Edmisten,* 390 F.Supp. at 361; *Zimmer v. McKeithen,* 485 F.2d at 1306. Congress indicated that plaintiffs are not required to show a casual connection between depressed socio-economic status and decreased opportunity to effectively participate in the political process. *Major v. Treen,* 374 F.Supp. at 341; *Gingles* at 363, f.n. 23; *United States v. Marengo,* 731 F.2d at 1567. The burden is upon defendants to show that this casual nexus does not exist, and that reduced participation is attributable to some other factor. *McMillan,* 748 F.2d at 1044; *Marengo* at 1568, 1569; *Cross v. Baxter,* 604 F.2d 875, 881-882 (5th Cir. 1979). Defendants have made no such showing.

Since its incorporation in 1913, Gretna has never had a black elected official. In *McMillan v. Escambia County, supra,* the Fifth Circuit on remand from the Supreme Court affirmed the finding of the trial court that the at-large system by which the county elected its commissioners effectively diluted minority voting strength, in violation of Section 2 of the Voting Rights Act. The absence of any black elected officials in an at-large scheme "is, of course, evidence of vote dilution." *Marengo,* 731 F.2d at 1571. *See White v. Register, supra; Zimmer v. McKeithen, supra.*

The record shows that only three times in Gretna's history have blacks run for office, and two of those attempts were made by the same individual. "[T]he lack of black candidates is a likely result of a racially descriminatory system." *McMillan,* 748 F.2d at 1045.

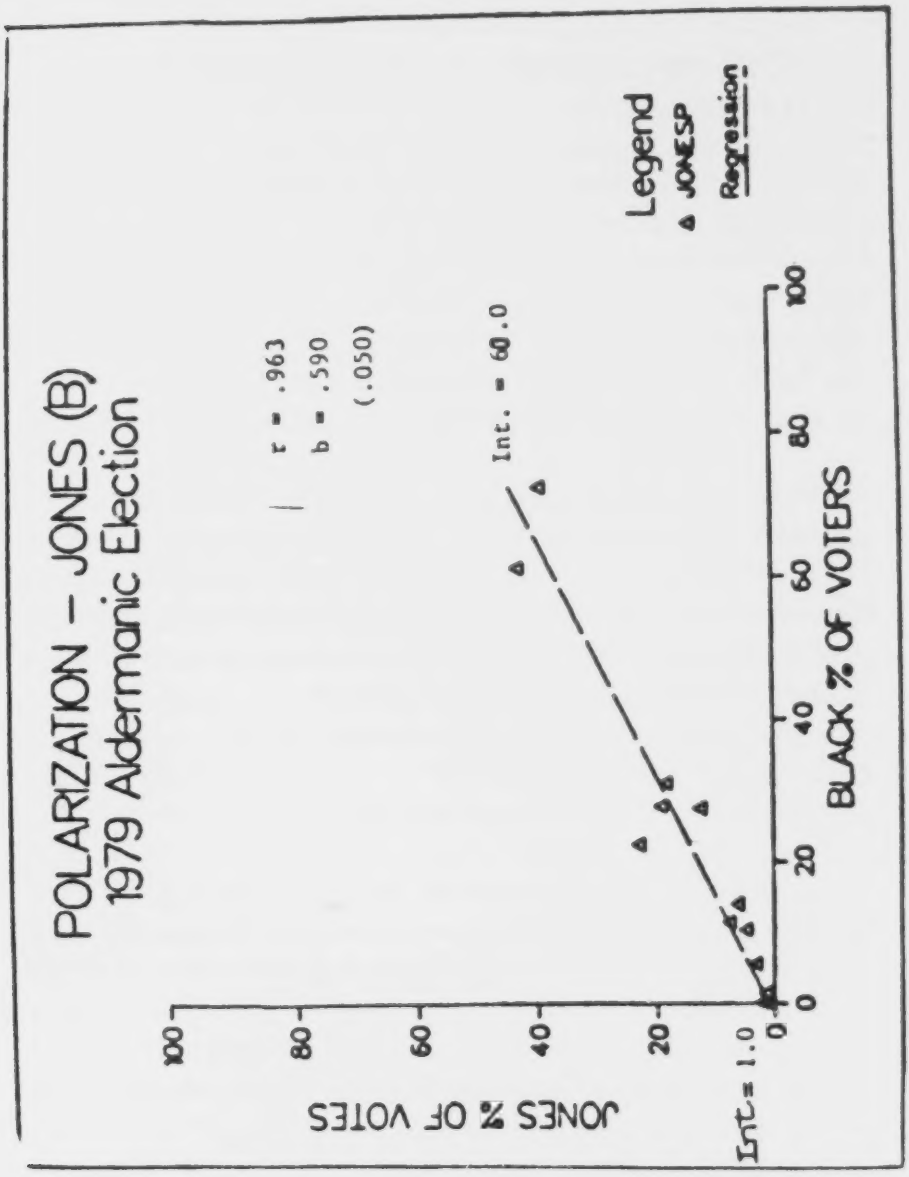
A consistently high degree of electoral polarization in gretna was proved through statistical and anecdotal evidence. Particularly as enhanced by Gretna's majority

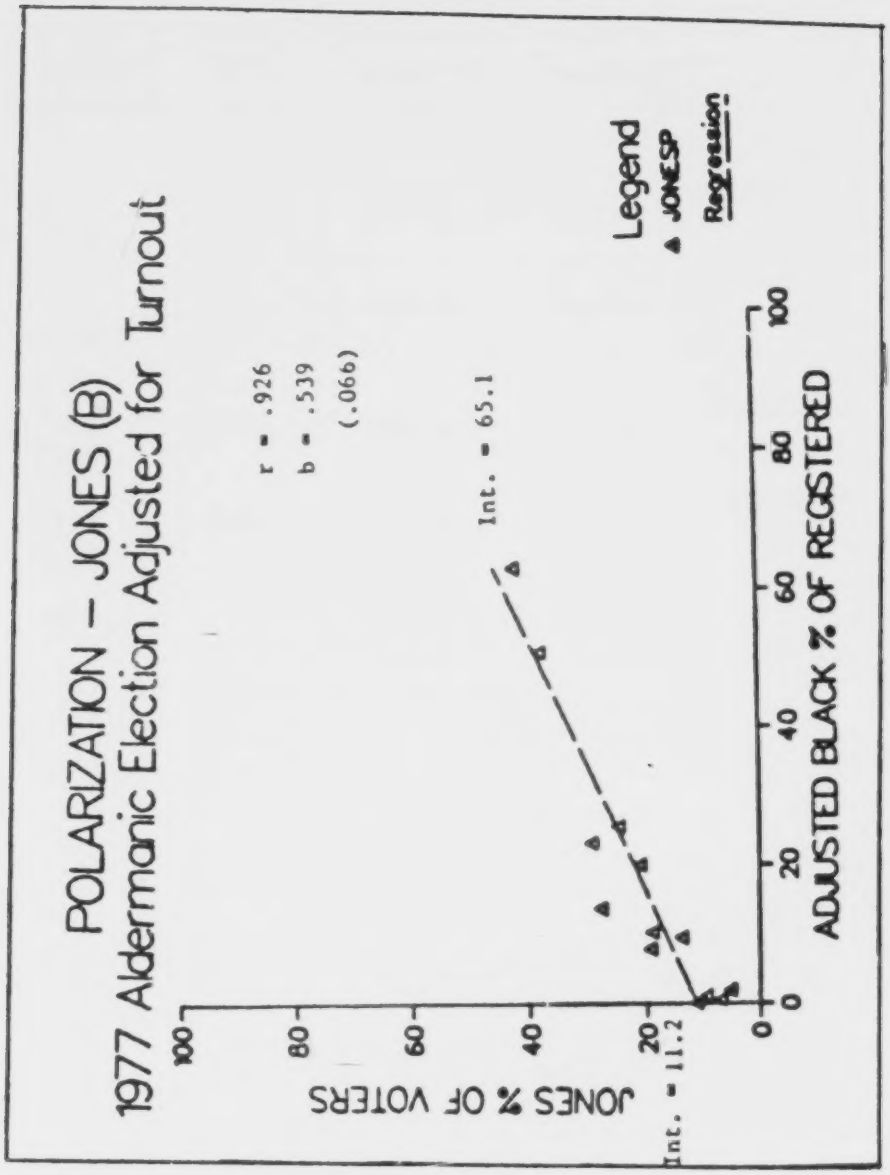
vote requirement, *see Major v. Treen*, 574 F.Supp. 351, n. 32, racial bloc voting substantially impairs the ability of black voters in Gretna to become fully involved in the democratic process. *Id.*

State law no longer requires the maintenance of the at-large system. The policy underlying the preservation of this system in Gretna is not relevant in determining whether there exists a violation of Section 2. As cited recently by the Fifth Circuit: "Particularly in light of the diminished importance [the tenuousness of state policy] factor has under the results test, we doubt that the tenuousness factor has any probative value for evaluating the 'fairness' of the electoral system's impact." *Jones v. City of Lubbock*, 727 F.2d at 383 (citations ommitted).

In sum, application of amended Section 2's "results" test to the aggregate of the facts adduced at trial, including Gretna's history on the present ability of blacks in Gretna to join in the political process, the vestiges of discrimination which take the form of a marked disparity in the socio-economic conditions under which blacks and whites currently subsist, and the parish's racially polarized voting, as exacerbated by its majority vote requirement, preponderates in favor of the plaintiffs.

Accordingly, the further use of the at-large system for the election of the Board of Aldermen within the City of Gretna is hereby prohibited. Defendants shall, within 30 days, submit to the Court a proposed new plan for electing persons to the Board of Alderman and simultaneously servea copy of same upon plaintiff's council. Obviously, it would be in the best interests of all citizens if the parties can reach an agreement on one plan. If not, the Court will review the proposal and issue whatever further orders it deems necessary at that time.


POLARIZATION – JONES (B)
1979 Aldermanic Election
r = .963
b = .590
(.050)
Int. = 60.0
Legend
JONESP
Regression
JONES % OF VOTES
BLACK % OF VOTERS
Int = 1.0
0
20
40
60
80
100


POLARIZATION – JONES (B)
1977 Aldermanic Election Adjusted for Turnout
r = .926
b = .539
(.066)
Int. = 65.1
Int. = 11.2
Legend
▲ JONESP
Regression
JONES % OF VOTERS
ADJUSTED BLACK % OF REGISTERED
0
20
40
60
80
100

Results of negression analysis in the 1977 and 1979 aldermanic elections.

| Year | Correlation Coefficient | Unstandardized Regression Coefficient | Standard Error of the b | *Intercepts Left (white) Right (black) |
|---|---|---|---|---|
| 1979 Unweighted: | r=.963 | b=.590 | (.050) | 1.0%<br>60.0% |
| Weighted: | r=.962 | b=.648 | (.002) | 0.9%<br>65.7% |
| 1977 Unweighted: | r=.926 | b=.539 | (.066) | 11.2%<br>65.1% |
| Weighted: | r=.926 | b=.553 | (.003) | 12.0%<br>67.2% |

(2)

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-597

# In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GRETNA, LOUISIANA, *et al.*,
Petitioners,

versus

CITIZENS FOR A BETTER GRETNA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Should This Court Grant Certiorari Where the Federal District Court Has Found Each of the Subsidiary Factors Present And Made the Final Factual Determination of Vote Dilution, as Required by This Court's Opinion in Thornburg v. Gingles, and the Court of Appeals Has Ruled That Those Findings Are Supported by Substantial Evidence?

II. Should This Court Grant Certiorari to Review a Court of Appeals Decision Which Applies the Principles of This Court's Recent Opinion in Gingles and Which is Wholly Consistent With Similar Decisions by Other Circuit Courts?

## TABLE OF CONTENTS

Page

Questions Presented..... ii

Table of Contents..... iii

Table of Authorities..... vi

Statement of the Case..... 1

I. Course of Proceedings in the Courts Below..... 1

II. Statement Of The Facts..... 5

Summary of the Argument..... 20

Reasons Why The Writ Should Be Denied..... 22

I. The District Court Was Clearly Correct In Its Analysis Of The Facts Of This Case And The Law Of The Voting Rights Act, As Amended..... 22

A. Fed. R. Civ. P. 52 Protects A District Court's Factual Findings, Especially in the Fact-Bound Inquiries Required in Voting Rights Cases..... 23

B. The District Court Employed the Correct Legal Standard for §2 Cases..... 25

II. The Opinions Of The Courts Below Rested Firmly Upon The Voting Rights Act (As Amended), Its Legislative History, And Its Authoritative Interpretation By This Court..... 28

A. The District Court Found That Plaintiffs Satisfied The"Totality Of Circumstances" Test, and the Fifth Circuit Rightly Affirmed..... 31

1. Plaintiffs Proved The Existence Of The Three Principal Factors..... 31

2. Plaintiffs Proved The Existence Of The Other Senate Report Factors..... 42

B. The District Court Correctly Considered Data From Elections In Which Black Candidates Ran For Public Office..... 46

1. The Courts Below Correctly Examined Elections in Which Minority Candidates Participated..... 47

2. Other Courts Uniformly Have Considered Probative Evidence of Racially Polarized

Voting by White Majorities in Such Elections..... 49

3. The District Court Correctly Considered Election Data Drawn Solely From Gretna Precincts..... 53

III. There Is No Conflict Among The Courts Of Appeals Regarding Any Relevant Issue Involved In This Case..... 60

Conclusion..... 62

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Bolden v. City of Mobile, 542 F.Supp. 1050 (S.D. Ala. 1982) | 56 |
| Buchanan v. City of Jackson, 683 F.Supp. 1515 (W.D. Tenn. 1988) | 52 |
| Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469 (8th Cir.1986) | 52,56 |
| Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988) | 38, 52,56 |
| Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), cert.denied, 108 S.Ct. 1111 (1988) | 60,62 |
| Citizens For A Better Gretna v. City of Gretna, 849 F.2d 1471 (5th Cir. 1988) | 5 |
| Citizens For A Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987) | 5,28, passim |
| Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113 (E.D. La. 1986) | 3, 7, 9,10 |

| Cases | Page |
|---|---|
| City of Newark v. New Jersey, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923)..... | 25 |
| Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987).. | 27 |
| Collins v. City of Norfolk, 478 U.S. 1016, 106 S.Ct. 3326, 92 L.Ed. 733 (1986)..... | 25 |
| Collins v. City of Norfolk, 768 F.2d 572 (4th Cir. 1985). | 26,27 |
| Collins v. City of Norfolk, 605 F.Supp. 377 (E.D. Va. 1984)..... | 26 |
| East Jefferson Coalition v. Jefferson Parish, 691 F.Supp.991 (E.D. La. 1988)..... | 52 |
| Gingles v Edmisten, 590 F.Supp. 345 (E.D. N.C. 1984)..... | 10 |
| Graves v. Barnes, 343 F.Supp. 704 (W.D. Tex. 1972), aff'd in relevant part sub nom. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed. 2d 314 (1973)..... | 50 |
| Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915)..... | 8 |

| Cases | Page |
|---|---|
| Jackson v. Edgefield County, South Carolina Sch. Dist., 650 F.Supp. 1176 (D. S.C. 1986) | 52 |
| Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) | 51 |
| Louisiana v United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) | 8 |
| Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923) | 62 |
| Major v. Treen, 524 F.Supp. 325, (E.D. La. 1983) | 56 |
| Martin v. Allain, 658 F.Supp. 1183 (S.D. Miss. 1987) | 52 |
| Monroe v. City of Woodville, 819 F.2d 507 (5th Cir. 1987) | 44 |
| Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980) | 51 |
| Pennsylvania v. New Jersey, 426 U.S. 660, 96 S.Ct. 2335, 49 L.Ed.2d 124 (1976) | 25 |
| Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) | 24,33 |

Cases — Page

Ross v. Moffitt,
417 U.S. 600, 94 S.Ct. 2437,
41 L.Ed.2d 341 (1974)..... 62

Smith v. Allwright,
321 U.S. 649, 64 S.Ct. 757,
88 L.Ed. 987 (1944)..... 8

Smith v. Clinton,
687 F.Supp. 1310 (E.D. Ark.
1988)..... 52

Thornburg v. Gingles,
478 U.S. 30, 106 S.Ct. 2752,
92 L.Ed.2d 25 (1986)..... 4,11,
passim

United States v. Dallas
County,
850 F.2d 1433 (11th Cir.
1988)..... 52

United States v. Marengo
County Comm'n,
731 F.2d 1546, 1566 (11th Cir.
1984) appeal dismissed and
cert. denied, 469 U.S. 976
(1984)..... 51

Wallace v. House,
538 F.2d 1138 (5th Cir.
1976), cert. denied,
431 U.S. 965 (1978)..... 44

White v. Regester,
412 U.S. 755, 93 S.Ct. 2332,
37 L.Ed.2d 314 (1973).....25,50,
58

Cases — Page

Williams v. Eggleston, 170 U.S. 304, 18 S.Ct. 617, 42 L.Ed. 1047 (1898)..... 25

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)..... 25

Windy Boy v. County of Big Horn, 647 F.Supp. 1002 (D. Mont. 1986)..... 56

Constitutions and Statutes

U.S. Const. amend. XIV..... 2

U.S. Const. amend. XV..... 2

42 U.S.C §§1971 et seq. (1982)..... 2,21, passim

42 U.S.C. §1983 (1982)..... 2

La. Rev. Stat.Ann. §33:321 et seq. (West 1951 and Supp. 1988)..... 6

La. Rev. Stat. Ann. §18:502 (West 1981)..... 39

Federal Rules

Fed. R. Civ. P. 52.....23,24

Books and Articles — Page

BLACK'S LAW DICTIONARY (5th ed. 1979)..... 55

Blackshar, Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1982, 17 Urb. Law. 347 (1985)..... 29

McDonald, The Majority Vote Requirement: Its Use and Abuse in the South, 17 Urb. Law. 429 (1985)..... 44

Wildgen, Measuring Malapportionment in Louisiana, 16 Loyola L.Rev. 383 (1969-70)... 33

Other

S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177 30,31, passim

127 CONG. REC. 23,176 (1981)..... 29

127 CONG. REC. 23,175 (1981)..... 29

## STATEMENT OF THE CASE

### I. Course Of Proceedings In The Courts Below.

On October 9, 1984, Plaintiffs-Respondents, Citizens for a Better Gretna (an unincorporated association concerned with the civil rights of black residents in the City of Gretna, Louisiana) and eleven black residents of the City, filed a class action suit seeking declaratory and injunctive relief on behalf of all present and future black citizens and voters of the City. Defendants (Petitioners before this Court) were the City of Gretna, its Mayor and the five members of the Board of Aldermen, sued both individually and in their representative capacities. (Record [R]: 1).

The complaint alleged that the then-existing system of at-large elec-

tions for the Board of Aldermen resulted in the dilution of the votes of black voters and, therefore, denied or abridged their right to vote and right to participate in the political process and to elect candidates of their choice, all in violation of the U. S. Constitution, amendments XIV, XV; §2 of the Voting Rights Act, as amended, 42 U.S.C. §§1971 et seq. (1982); and 42 U.S.C. §1983 (1982). (R: 7).

On May 12, 1986, the U.S. District Court for the Eastern District of Louisiana (in an opinion[1] by the Hon. Robert F. Collins) held, inter alia:

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1. Respondents urge this Court to refer to the District Court's opinion reported at 636 F.Supp. 1113, as the version included in the Appendix to the Petition for Certiorari is riddled with typographical errors. These errors, which did not appear in the original opinion, make Judge Collins' well-reasoned opinion extremely difficult to read.

> the continuing effect of a majority vote requirement through the use of an "unusually large" election district -- results in the submergence of black registered voters in the City of Gretna as a voting minority with substantially less opportunity than other members of the electorate to participate in the political process, thereby depriving the black voters of their lawful right to elect representatives of their choice.

Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113, 1131 (E.D. La. 1986) (R: 197).

The District Court, therefore, concluded "on the basis of factual findings, that the 'at-large' system of election to the Board of Aldermen in the City of Gretna violates Section 2 of the Voting Rights Act." 636 F.Supp. at 1115 (R: 151). Hence, on November 7, 1986, the District Court rendered its final judgment, which enjoined Defendants-Petitioners from conducting elections un-

der that system (R: 439). On November 18, 1986, the District Court denied Defendants' motion for a new trial, ruling that the court's final judgment was "completely consistent with controlling precedent." (R: 447).[2]

The District Court authorized elections for the Board of Aldermen for the City of Gretna, under a 4 single-member, 1 at-large (along with a mayor), districting plan proposed by the City. (R: 511).

On December 23, 1987, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's judgments, holding that the factual findings were amply supported by the record and were consistent with the standard set forth in this Court's Gingles opinion, and

2. Of course, at that time the precedents included this Court's opinion in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

with other precedents in the voting rights field. Citizens For A Better Gretna v. City of Gretna, 834 F.2d 496, 502 n.13 (5th Cir. 1987). On June 13, 1988, the Fifth Circuit, without dissent, denied Defendants' motion for rehearing and suggestion for rehearing en banc. Citizens For A Better Gretna v. City of Gretna, 849 F.2d 1471 (5th Cir. 1988).

Defendants-Petitioners then filed the instant Petition with this Court.

## II. Statement of the Facts

### A. The Electoral System in Gretna

The 1980 U.S. Census revealed that the population of the City of Gretna (in Jefferson Parish, Louisiana) was 20,615 persons, 28 percent of whom were black. (Transcript, Volume 1: Page 105/Line 24, Page 106/Line 2 [TR1: 105/24, 106/2]).

Gretna has a Mayor-Aldermen form of Government pursuant to Louisiana's Lawrason Act. La. Rev. Stat. Ann. §33:321 et seq. (West 1951 and Supp. 1988). Prior to this case, all five aldermen were elected by majority vote in citywide ("at-large") elections, to serve concurrent four-year terms. (TR2: 76/13-18, 77/15-21). There was no requirement that members of the Board of Aldermen reside in different geographical areas of the municipality. (TR2: 76/19-21).

**B. The History of Official Discrimination**

As a part of its factual findings, the District Court summarized: "The history of black citizens' attempts, in Louisiana since Reconstruction, to participate effectively in the political process and the white majority's resistance to those efforts is one character-

ized by both de jure and de facto discrimination." 636 F.Supp. at 1116 (R: 154). Dr. Raphael Cassimere, Jr.'s unrefuted expert testimony detailed the history of racial discrimination in Louisiana and Jefferson Parish. Following the Civil War, the federally imposed Reconstruction Act allowed the greatest electoral success Louisiana's black citizens have ever enjoyed. (TR1: 78/10-14). White persons in Louisiana, however, responded with organized opposition, including boycotting elections, altering vote counts, and murdering black elected officials and sympathetic whites. (TR1: 78/25-79/9).

After the federal withdrawal from the South, Louisiana enacted a series of disenfranchising measures, causing black voter registration to plummet from 136,000 in 1896 to less than 1,000 in

1910. Most of these measures were ended only after direct intervention by this Court. See, e.g., Louisiana v United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) (striking down "constitutional interpretation" and "good morals" tests as conditions of registration); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (abolishing "white primaries" which effectively operated as the actual election); Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915) (invalidating property ownership requirement which "grandfathered" in whites owning no property).

As recently as 1963, Jefferson Parish blacks, unlike whites, were required by the registrar of voters to perform complex mathematical calculations and to recite the preamble to the

Constitution before being allowed to register. 636 F.Supp. at 1117 (R: 157).

Furthermore, all public facilities in Louisiana were racially segregated until 1964. (TR1: 88/20-24). Segregation lasted even longer in education. The quality of education offered to Louisiana blacks in the segregated system was very poor, educational appropriations for blacks were substantially lower than for whites, and salaries of black teachers were less than 35 percent of white teachers. (TR1: 89/5-13, 84/20-22). It was not until 1978 that the Jefferson Parish schools were completely integrated, again with federal court intervention. See 636 F.Supp. at 1118.

### C. Gretna's Racially Exclusionary Candidate Slating Process

Dr. Cassimere, Alderman Uzee, and former candidate Edwin Romain testified

regarding the operation of the candidate slating process (the "Miller-White Ticket") in Gretna. (TR1: 94-95, 132-39, 140-147). Judge Collins found: "It is extremely difficult to win an aldermanic election without the Miller-White endorsement." 636 F.Supp. at 1123 (R: 171-74). He also found that Plaintiffs "presented, very cogently and convincingly, evidence that the black community has been effectively excluded from the informal slating process that is carried on in Gretna." Id.

**D. Racial Polarization In Gretna**

Similar to Gingles v Edmisten, 590 F.Supp. 345 (E.D.N.C. 1984), aff'd in relevant part, Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), a large portion of the trial in the instant case was devoted to establishing the existence of racial polar-

ization in the voting patterns of Gretna voters. Plaintiffs' expert testimony was based on the identical analysis later approved by this Court in Gingles, 478 U.S. at 52-53.

After reviewing the testimony of both Plaintiffs' and Defendants' experts, the District Court concluded that racially polarized voting was "persistent and severe" among Gretna's voters. See 636 F.Supp. at 1124.

**1. The Plaintiffs' Evidence**

Dr. Michael McDonald, an expert in political science specializing in electoral politics and statistical methodology, outlined the statistical analysis used to examine the degree of racial polarization. Employing the widely used Statistical Package for the Social Sciences (SPSS), Dr. McDonald performed regression and correlation analyses, as

well as graphic analyses, on the data regarding Gretna voters gathered from the Registrar of Voters. (TR2: 7/2-8).

In order to avoid aggregation bias (and, therefore, ecological fallacy) in these regression analyses, Dr. McDonald also analyzed the level of support for black candidacies in three all-white precincts. (TR2: 25-30, 37-38). Utilizing census data, voter registration rolls, and election returns, Dr. McDonald concluded that no identifiable group of whites, at any socioeconomic level, have supported black candidates in Gretna elections. (TR2: 36/6-16; see generally TR2: 29-36).

Dr. Richard Engstrom, an expert in political science particularly in the areas of urban and minority politics (TR2: 76/2), also testified regarding the existence of racially polarized vot-

ing in Gretna. (TR2: 94/1). His report, based upon the statistics prepared by Dr. McDonald, examined three elections (in 1973, 1977, and 1979) in which black candidates ran for the Board of Aldermen. (TR2: 85-86).

**The 1979 Gretna Aldermanic Election**

Dr. Engstrom testified that the 1979 aldermanic election revealed that, as the percentage of blacks in the population rose, the percentage of votes for Mr. Jones also consistently increased. (TR2: 88/18-22). The unweighted regression analysis revealed that only one percent of the voters in an all-white precinct voted for Jones (TR2: 90/7-10), but that Jones received 60 percent of the votes cast by black persons. (TR2: 93/17). A "weighted" regression analysis of the 1979 election revealed nearly identical results -- Jones received 0.9

percent of the white vote and 65.7 percent of the black vote. (TR2: 95/6-10).

Dr. Engstrom also analyzed three homogeneous white precincts in Gretna. (TR2:95/16). Out of 1,458 votes cast in these white precincts, Jones received only 22 votes, or 1.5 percent. (TR2: 95/21-96/2). Dr. Engstrom calculated that in the two majority black precincts, Jones received 65.9 percent of the black votes cast. (TR2: 96/22-98/1).

**The 1977 Gretna Aldermanic Election**

Dr. Engstrom analyzed the 1979 aldermanic election, in which Jones again was the sole black candidate. Unweighted regression analysis indicated that Jones received only 11.2 percent of the votes cast by Gretna's whites, but over 65 percent of the black vote. (TR2: 103/17-24). The weighted regres-

sion yielded only slightly different figures. (TR2: 104/6-11). In the three homogeneous white precincts, where only 13 blacks were registered to vote, Jones finished last among twelve candidates in all three precincts. (TR2: 105/22, 106/2-3).

**The 1973 Gretna Aldermanic Election**

A paucity of data made it impossible to analyze in the same detail 1973 election in which Edwin Romain campaigned. Dr. Engstrom noted, however, that in the runoff election Mr. Romain finished first or second (of six candidates) in the two black majority precincts, but last in all other precincts, and, therefore, finished last in the election. (TR2: 85/20, 107/ 9-18).

**2. The Defendants' Evidence**

Defendants relied heavily on the testimony of Dr. John Wildgen, an expert in political science. (TR3: 75). Dr. Wildgen admitted at trial that he neither conducted any type of regression analysis nor accumulated survey data (which he asserted is more precise than linear regression analysis). (TR3: 87/9-11, 101/24, 103/22). Dr. Wildgen strongly disagreed with Plaintiffs' evidence (TR3: 89-90), but neither he nor anyone else put forward any evidence at trial to refute Plaintiffs' evidence. (TR3: 103/18-24, 141/2). Dr. Wildgen contended that Plaintiffs did not prove racial polarization. He stated that racial polarization usually exists where there is a high voter turnout among blacks, with a resulting "white backlash." (TR3: 113/17-114/6).

### E. Electoral Practices in Gretna Which Enhance Discrimination Against Blacks

Two Gretna electoral practices enhance racial discrimination. Dr. Engstrom observed that at-large electoral systems dilute minority votes where "voting is racial[ly] polarized" and where "the black population in the political jurisdiction is sufficiently large and sufficiently concentrated so that a fairly drawn single member district plan would provide the black minority with an equal opportunity to elect a candidate of its choice."[3] (TR2: 83/2-10). Dr. Engstrom added that Gretna's majority vote requirement "makes it much more difficult for . . . a minority group's favorite candidate or minority candidates to attain sufficient

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3. This language, of course, is nearly identical to the standard later mandated by this Court in Gingles. See 478 U.S. at 50-51.

votes in order to be elected." (TR2: 80/17-23). His conclusion is widely supported in political science literature. (TR2: 81/9).

### F. The Lingering Effects of Past Discrimination

The long, sad history of disenfranchisement, segregation and unequal education in Gretna, Louisiana has engendered effects which continue to this day. In 1980, the median family income for Gretna whites was $18,524, but for black families was $9,721 (i.e., 52 percent as much). (TR1: 109/13-15). More than 34 percent of Gretna's black families have incomes below the poverty level, compared to only 9.7 percent of their white counterparts. Moreover, 60 percent of Gretna's blacks over age 25 have no high school education, while the comparable figure for whites is only 46 percent. (TR1: 109-110). The District

Court found that "Blacks are consistently concentrated in low income areas and are conspicuously absent from the more affluent areas of Gretna. The evidence presented at trial further shows that the City of Gretna has done little to help alleviate this problem." 636 F.Supp. at 1118 (R: 160). This combination of past discrimination and current depressed socioeconomic conditions contributes significantly to low black voter turnout. (TR1: 118/5-119/2).

**G. Lack of Electoral Success by Blacks in Gretna**

From the City's creation in 1913 until the districting mandated by the court in this case, no black was ever elected to the Gretna Board of

Aldermen.[4] 636 F.Supp. at 1134 (R: 167; see also TR1: 93/23-94/1). No blacks were elected in Jefferson Parish prior to the adoption of the Voting Rights Act. (TR1: 91/11). Indeed, from the turn of the century until then, blacks "had no impact on the political process . . . [T]hey did not have any say so as to who governed their lives." (TR1: 90/20-22) (Dr. Cassimere).

## SUMMARY OF THE ARGUMENT

This is a straightforward, classic case of the type Congress envisioned when it adopted the Amendments to the Voting Rights Act in 1982. The City of Gretna has a 28 percent black population and, despite numerous attempts, no black person was ever elected to the Board of

4. In May 1987, after the District Court's imposition of the districting plan proposed by the City, Leo Jones, the first black Alderman in the City's history, was elected to represent the majority black district.

Aldermen under the at-large election system. The District Court found that the confluence of past discrimination, the at-large system, an exclusionary candidate system, and racial bloc voting resulted in the dilution of the votes of Gretna's black citizens, in violation of §2.

The Court of Appeals for the Fifth Circuit reviewed all of the evidence on both sides, under the standards mandated by this Court in its recent opinion in Thornburg v. Gingles. The Fifth Circuit concluded that the District Court had applied the correct legal standard, and that the subsidiary findings of fact and final factual conclusion were well-supported by the evidence. Both opinions below relied upon statistical analysis of the type recently approved by this Court in Gingles, and they drew

upon the elections and the candidacies which have been uniformly used in other voting rights cases throughout the country.

The Petition raises no important issues worthy of this Court's valuable time. There has been no change in the law which would require a remand, and there is no conflict among the Courts of Appeals. Hence, there is no reason to grant certiorari.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. The District Court Was Clearly Correct In Its Analysis Of The Facts Of This Case And The Law Of The Voting Rights Act, As Amended.

Petitioners would have this Court reexamine the factual determinations of the District Court regarding racially polarized voting. In fact, they repeatedly have attempted to relitigate these fact-bound issues: in their appeal to

the Fifth Circuit; in their petition for rehearing and suggestion of rehearing en banc; and now in their Petition for Certiorari before this Court. At each point their claims have been rejected without dissent. Respondents urge this Court to decline to upset the well-supported factual findings.

### A. Fed. R. Civ. P. 52 Protects A District Court's Factual Findings, Especially in the Fact-Bound Inquiries Required in Voting Rights Cases.

Rule 52(a) of the Federal Rules of Civil Procedure provides, inter alia: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." In vote dilution cases, the "clearly erroneous" rule is the standard of review, not only as to each of the subsidiary factual elements but also to the ultimate determination regarding vote dilu-

tion. Thornburg v. Gingles, 478 U.S. 30, 78, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Applying this very deferential standard of review to "findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." 478 U.S. at 79. See also Rogers v. Lodge, 458 U.S. 613, 622-23, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (determination whether at-large electoral system maintained for a discriminatory purpose is governed by Rule 52).

As this Court has stated, the factual findings of the trial court represent "a blend of history and an intensely local appraisal of the design and impact of . . . the multimember district in the light of past and present reality, political and otherwise."

White v. Regester, 412 U.S. 755, 769-70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (emphasis added), reaffirmed in Gingles, 478 U.S. at 78.

### B. The District Court Employed the Correct Legal Standard for §2 Cases.

Petitioners claim that the Constitution entitles them to a remand[5] because this Court remanded Collins v. City of Norfolk, 478 U.S. 1016, 106

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5. Petitioners assert that to deny a remand in this case is "to deny [the City of] Gretna equal protection." Pet. for Cert. 7 n.5. But, the Equal Protection Clause "protects people, not States." Pennsylvania v. New Jersey, 426 U.S. 660, 665, 96 S.Ct. 2335, 49 L. Ed. 2d 124 (1976). Nor do state subdivisions, e.g. cities, have Equal Protection rights. See, e.g., Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 39, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); City of Newark v. New Jersey, 262 U.S. 192, 196. 43 S.Ct. 539, 67 L.Ed. 943 (1923); Williams v. Eggleston, 170 U.S. 304, 309, 18 S.Ct. 617, 42 L.Ed. 1047 (1898). Hence, the City cannot invoke the Equal Protection Clause to justify an electoral structure which has been invalidated as racially discriminatory.

S.Ct. 3326, 92 L.Ed. 733 (1986), for reconsideration in light of Gingles. In Collins, the District Court wrongly relied upon a definition of racial polarization based upon "white backlash" and high black turnout. 605 F.Supp. at 386, 388.[6] (Interestingly, that definition, rejected by this Court in Gingles, is the very one urged by Defendants' expert witness in the instant case. (TR3: 113/7-114/6).). The Fourth Circuit affirmed, in an opinion handed down before Gingles. Collins, 768 F.2d 572, 576 (4th Cir. 1985). Hence, remand was necessary in Collins so the District Court

6. The Collins court wrongly rejected a definition of racially polarized voting as "when the majority of one racial group votes contrary to the majority of another racial group." Collins, 605 F.Supp. 377, 386 (E.D. Va. 1984). In other words, the Collins court wrongly rejected a definition quite similar to the one approved by this Court in Gingles. See 478 U.S. at 48 ("where minority and majority voters consistently prefer different candidates").

could apply the correct racial polarization standard. Collins v. City of Norfolk, 816 F.2d 932, 936 (4th Cir. 1987) (on remand).

By contrast, the opinion of the District Court in the instant case, though issued prior to Gingles, rejected the incorrect test, and applied the correct racial polarization standard, as derived (like Gingles) from the language and legislative history of the 1982 Amendments. Defendants also brought Gingles to the District Court's attention in their motion for a new trial. That court found its opinion well within this Court's mandate and denied the motion. Furthermore, unlike the Court of Appeals in Collins, the Fifth Circuit rendered its opinion well after Gingles. Indeed, the Fifth Circuit was able to conclude that the District Court had an-

ticipated[7] Gingles in several important respects, and the Fifth Circuit itself carefully analyzed the evidence based upon the Gingles opinion. See Gretna, 834 F.2d at 497. Petitioners' reliance upon the procedural posture of Collins is, therefore, misplaced

## II. The Opinions Of The Courts Below Rested Firmly Upon The Voting Rights Act (As Amended), Its Legislative History, And Its Authoritative Interpretation By This Court.

Congress amended §2 of the Voting Rights Act in 1982 to increase the opportunity for members of racial and language minorities, including Respondents in the instant case, to participate equally with "other members of the electorate" and "to elect candidates of

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7. The District Court seemed to have benefited from the good fortune of having Dr. Richard Engstrom as Plaintiffs' expert witness, whose analysis of §2 claims this Court found helpful in Gingles. See 478 U.S. at 53 n.20, 55.

their choice." The 1982 Amendments were specifically designed to clarify the standard of proof required to establish a §2 violation, see 127 CONG. REC. 23,175 (1981) (remarks of Rep. Sensenbrenner), and to relieve plaintiffs of "the impossible burden," see 127 CONG. REC. 23,176-77 (1981) (remarks of Rep. Edwards), of proving purposeful voting discrimination against racial and ethnic groups. See generally Blacksher, Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1982, 17 Urb. Law. 347, 347-53 (1985).

When this Court, in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), first considered the

effect of the 1982 Amendments, it[8] turned to the principal source of guidance provided by Congress -- the Senate Report. S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177 [hereinafter "S. Rep."].

The Senate Report lists nine illustrative factors for courts to consider when analyzing a claimed violation of §2. This Court noted that the list "is neither comprehensive nor exclusive. . . . '[T]here is no requirement that any particular number of factors be proved, or that a majority of them point

8. Justice Brennan authored a five-part majority opinion, four parts of which were joined by Justices Marshall, Stevens, Blackmun, and White. Although this Court certainly requires no assistance in tallying its own votes, we provide this brief commentary solely to demonstrate that Petitioners have misread and miscounted the votes in Gingles with regard to issues critical to their position. See Pet. for Cert. 13, 21.

one way or the other'." Gingles, 478 U.S. at 45, quoting S.Rep. 29-30.

### A. The District Court Found That Plaintiffs Satisfied The "Totality Of Circumstances" Test, and the Fifth Circuit Rightly Affirmed.

#### 1. Plaintiffs Proved The Existence Of The Three Principal Factors.

To prove a violation of §2, i.e., vote dilution, plaintiffs first must demonstrate a conjunction of three circumstances. First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single member district." Second, the minority group must be "politically cohesive." Finally, the white majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate. Gingles, 478 U.S. at 30.

The first factor is not at issue here. The district plan proposed by the City after the judgment of the District Court included a majority black district. The court approved that plan. In 1987, when Leo Jones was elected from the district, he became the first black person ever elected to the Gretna Board of Alderman.

The second and third factors --minority political cohesion and white bloc voting -- are two measures of racially polarized voting, which occurs "where minority and majority voters consistently prefer different candidates." 478 U.S. at 48. In an at-large or multimember electoral system where there is racial bloc voting, "the majority, by virtue of its numerical superiority, will regularly defeat choices of minority voters.". Id. Racial bloc voting

"'allows those elected to ignore [minority] interests without fear of political consequences'." Id., n.14, quoting Rogers v. Lodge, 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Even Defendants' expert witness has explained, in a similar context:

> [I]t should come as a surprise to no one save the most ingenuous that multi-member districts are intimately connected with Louisiana's racial problem . . . . [The State] create[d] large districts in which the black minority becomes diluted by the overwhelming numbers of white suburbanites.

Wildgen, Measuring Malapportionment in Louisiana, 16 Loyola L.Rev. 383, 394-95 (1969-70).

Contrary to Petitioners' assertion, it is inappropriate to focus solely upon minority political cohesion and the motivations behind minority support for

candidates. Instead, the analysis should turn upon an inquiry into the majority's voting patterns. This inquiry is necessary to determine a violation of §2, i.e., whether the white electorate votes as a bloc, thereby usually preventing the success of the minority-preferred candidate. District Judge Collins, in a rather prescient analysis, anticipated this Court by fashioning a racial polarization standard remarkably similar to, and totally consistent with, the approach later mandated by this Court in Gingles.

The only complete data available on Gretna elections cover the post-1975 period.[9] Consequently, only two elections in which blacks ran for alderman are ca-

9. The 1973 aldermanic election was qualitatively analyzed by the testimony of unsuccessful black candidate Edwin Romain, and Plaintiffs' expert, Dr. Engstrom. See Statement of the Facts, above.

pable of detailed quantitative analysis by anyone. As demonstrated at trial, these 1977 and 1979 election results[10] reveal that, precinct by precinct, black Gretna residents voted for black candidates at a rate of 60 to 67 percent, while white residents voted for black candidates at rates as low as 0.9 percent and no higher than 12 percent.

Leo Jones, a black person, was twice a viable and legitimate candidate, 636 F.Supp. at 1128 (R: 168). He received a majority of the votes cast by Gretna's black voters, but little or no support from white voters. 636 F.Supp. at 1128 (R: 184-190). These data demonstrate a large discrepancy between the

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10. The 1979 data analyzed by Dr. McDonald were unique in their detail, as figures on actual turnout, by race, were maintained by the Registrar of Voters during the relevant period. See TR2: 28/17.

voting patterns of white and black voters.

The District Court also examined, but was unimpressed by, the testimony of Defendants' expert, Dr. John Wildgen. The court found that the evidence presented at trial "clearly beli[ed]" Dr. Wildgen's contention that "the elections in which blacks have vied for seats on the Board of Aldermen were not characterized by racial polarization." Id. at 1129-30. Moreover, the court explicitly made a negative determination as to Dr. Wildgen's credibility, noting that "contrary to previous publications and testimony, Dr. Wildgen now contends that regression analysis is inappropriate for measuring racial polarization." Id. at 1130.

The District Court also noted that the inquiry into race as a determinant

of voter preference was of special significance in the instant case, given the operation of the exclusionary candidate slating organization. See Statement of the Facts, above. In the 1973 Gretna aldermanic election, Edwin Romain, a black businessman, was excluded from "a meeting of candidates called by Chief Miller to form the Miller-White slate." Gretna, 636 F.Supp. at 1130. After seeking Chief Miller's endorsement, Romain was told that he was not needed to get the black vote. Nonetheless, he campaigned extensively in white areas of the City. In the primary election, Romain finished high enough to qualify for the runoff election. In the runoff election, however, Romain finished first or second in the majority black precincts, but last in the homogeneous

white precincts, thereby losing the election. Id.

Based on the voluminous evidence, both statistical and narrative, submitted at trial by Plaintiffs, and in the face of no contradictory evidence presented by Defendants, the District Court properly found "a consistently high degree of electoral polarization in Gretna." Id. at 1135.

Petitioners now assert that the Fifth Circuit "inexplicably" ignored the candidacies of two blacks, Sylvester Brown and Larry Napoleon "Boogaloo" Cooper. Pet. for Cert. 16. In fact, the District Court's opinion already had explained that Cooper was "apparently a fringe candidate." 636 F.Supp. at 1126 n.31. See Campos v. City of Baytown, 840 F.2d 1240, 1245 n.7 (5th Cir. 1988) (where minority candidate has support

from neither white nor black voters, it is inappropriate to assume candidate preferred by any group). Furthermore, as Brown had withdrawn from the race before the election, 636 F.Supp. at 1126 n.31, there was absolutely no voting data on his candidacy available for anyone to analyze. See La. Rev. Stat. Ann. §18:502 (West 1981) (when a candidate withdraws, "any votes received . . . shall be null and void and shall not be counted for any purpose").

These factual findings are neither the product of some whimsy by the District Court nor a "mischievous" reading of the Gingles criteria by the Fifth Circuit, as Petitioners suggest. Rather, they are the result of precise and detailed application of the standards of review elucidated by this Court. It is not surprising that the

Fifth Circuit ruled that Judge Collins' decision is completely consistent with Gingles, see Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 499 (5th Cir. 1987), as both cases involved review of facts against standards drawn from the language and legislative history of the statute being interpreted and applied -- the Voting Rights Act, as amended.

Petitioners stridently oppose the District Court's reliance upon data from elections with both black and white candidates. Pet. for Cert. 7-8. In reality, the District Court considered, but rejected as "spurious at best," the argument that the Voting Rights Act was intended to protect white incumbents. Gretna, 636 F.Supp. at 1120-21. Petitioners are merely trying to cleanse the fact that Gretna's white majority con-

sistently has vetoed black-supported black candidates whenever they have sought office. By insisting upon the use of elections in which there were white candidates only, Petitioners implicitly admit that there was no white support for black candidates. Even though Gretna has a 28 percent black population, and the black community has supported black candidates, no black was ever elected. The white majority simply overwhelmed the black minority every time a black-supported black candidate ran. In other words, prior to the districting ordered in this case black residents in Gretna could have any color representative they wanted . . . so long as he or she was white. See Gretna, 636 F.Supp. at 1121.

### 2. Plaintiffs Proved The Existence Of The Other Senate Report Factors.

In addition to the three principal Gingles factors, Respondents also established the existence of numerous additional factors specified by the Senate Report for §2 cases.

**History of Official Discrimination**

Dr. Cassimere testified copiously regarding the sad history of official discrimination, including the inferior instruction provided to blacks in Gretna's segregated schools. The District Court specifically found that "the legacy of this system persists even today. While the majority of whites over age 25 possess a high school education (54%) only 40% of blacks over age 25 are high school graduates." Gretna, 636 F.Supp. at 1118. Moreover, income and employment figures demonstrated the ex-

treme disparity between Gretna's whites and blacks in the socioeconomic conditions engendered by this separate and unequal treatment. Id.

**Exclusion From the Crucial Slating Process**

The District Court found that election to public office in Gretna was dependent upon a group of elected officials known as the "Miller-White Ticket." Based on the testimony of Edwin Romain, Aldermen Uzee, and others, the District Court found that this candidate slating process systematically excluded blacks from participation. Gretna, 636 F.Supp. at 1123.

**Electoral Practices in Gretna Which Enhance Discrimination Against Blacks**

At the time of the trial, Gretna used the largest possible election district -- the entire City. Gretna was the most populous Louisiana city to

elect its governing body under an at-large system. In fact, over 90 percent of the municipalities in the state with at-large elections have populations less than one fifth that of Gretna. See Gretna, 636 F.Supp. at 1124. Municipalities much smaller than Gretna have met with difficulty under the Voting Rights Act in attempting to maintain such at-large systems. See, e.g., Monroe v. City of Woodville, 819 F.2d 507 (5th Cir. 1987) (population of 1,512); Wallace v. House, 538 F.2d 1138 (5th Cir. 1976) (population of 5,200), cert. denied, 431 U.S. 965 (1978).

Gretna also has a majority vote requirement which increases minority vote dilution (TR2: 80/17-23). See generally McDonald, The Majority Vote Requirement: Its Use and Abuse in the South, 17 Urb. Law. 429 (1985).

**Lingering Effects of Past Discrimination**

Dr. Cassimere's testimony indicated that blacks in Gretna continue to suffer the debilitating effects of past de jure and de facto discrimination. Blacks in Gretna have a median income only slightly more than half that of whites; three times as many Gretna black families live below poverty level; and black unemployment is more than twice that of whites. Gretna, 636 F.Supp at 1118.

**Lack of Electoral Success by Blacks in Gretna**

The District Court found that no black person had ever been elected to public office in Gretna. Indeed, only two black persons had ever run for public office there -- Edwin Romain and Leo Jones (who was twice defeated under the at-large system). Gretna, 636 F.Supp. at 1134. After a black majority district was created in response to the

District Court's decision in this case, Leo Jones was elected to represent that district, becoming the first black ever elected to the Gretna Board of Aldermen.

### B. The District Court Correctly Considered Data From Elections In Which Black Candidates Ran For Public Office.

This Court has identified "'the extent to which minority groups have been elected to public office in the jurisdiction'" as one of the two "most important Senate factors bearing on §2 challenges to multimember districts."[11] Gingles, 478 U.S. at 48 n.15. This emphasis "effectuates the intent of Congress" to provide racial and ethnic minorities with access to the political process after more than a century of

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11. The other factor, racially polarized voting, is discussed in Part II.A.1, above.

racially discriminatory election laws and policies. Id.

**1. The Courts Below Correctly Examined Elections in Which Minority Candidates Participated.**

Petitioners contend that the courts below incorrectly examined only those elections in which minority candidates participated and that this constituted an impermissible focus. Pet. for Cert. 8-14. They seek support for this claim in the following language from Justice Brennan's plurality opinion: "Under §2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important." Gingles, 478 U.S. at 68 (emphasis in original). When this passage is read within the context of the remainder of Justice Brennan's opinion (especially footnote 15), however, it does not (as

Petitioners seem to think) contradict the carefully crafted legal framework which commanded a majority of this Court.

As the Fifth Circuit correctly noted, this portion of Justice Brennan's opinion is "properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter -- but only within the context of an election that offers voters the choice of supporting a viable minority candidate." Citizens for a Better Gretna v. City of Gretna, 834 F.2d at 503 (emphasis added).

As the District Court found, Gretna's residents do vote along racial lines -- Gretna whites simply do not vote for black candidates, while Gretna blacks do. It is unreasonable for Petitioners now to argue that this dif-

ference can be ascertained without analyzing racial bloc voting in elections where minority candidacies are tenable, especially given Gretna's exclusionary slating process. As observed by the Fifth Circuit, "implicit in the Gingles holding is the notion that black preference is determined from elections which offer the choice of a black candidate." Gretna, 834 F.2d at 503-04. To hold otherwise would be contrary to the clear intent of Congress in passing, and amending, the Voting Rights Act.

**2. Other Courts Uniformly Have Considered Probative Evidence of Racially Polarized Voting by White Majorities in Such Elections.**

Courts have long accepted the proposition that "elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines."

Graves v. Barnes, 343 F.Supp. 704, 732 (W.D. Tex. 1972), aff'd in relevant part sub nom. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). This is especially significant, because Congress viewed the 1982 Amendments as "codifying the leading pre-Bolden vote dilution case, White v. Regester." S. Rep. 2.

Though, prior to Gingles, courts disagreed as to certain aspects of polarized voting, they were united in ruling that the purpose of the inquiry was to determine if voters were in fact voting on the basis of race. As the Fifth Circuit stated: "If racially polarized voting did not exist, white candidates could not expect to retain or achieve office solely because they were white . . . . [B]lack candidates could not be denied office because they were black."

Nevett v. Sides, 571 F.2d 209, 223 n.16 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980). See also United States v. Marengo County Commission, 731 F.2d 1546, 1566 (11th Cir. 1984) (Wisdom, J.), appeal dismissed and cert. denied, 469 U.S. 976 (1984). In short, "polarized voting confirms that race, at least subtly, remains at issue in the political systems" Jones v. City of Lubbock, 727 F.2d 364, 385 (5th Cir. 1984).

Not only is Petitioners' interpretation untenable, but it would overturn the jurisprudence upon which the 1982 Amendments to §2 and Gingles are founded, as well as the dozens of subsequent cases applying these controlling precedents. Focus upon elections with minority candidacies has consistently been treated as critical in determining

racial polarization. Indeed, it has become the methodology employed by every Court of Appeals that has considered §2 claims since Gingles. See, e.g., United States v. Dallas County, 850 F.2d 1433 (11th Cir. 1988); Campos v. City of Baytown, 840 F.2d 1240, 1248-49 (5th Cir. 1988); Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469, 470, 476 (8th Cir. 1986). The district courts also have consistently focused upon black-white electoral contests. See, e.g., East Jefferson Coalition v. Jefferson Parish, 691 F.Supp. 991, 1001 (E.D. La. 1988); Smith v. Clinton, 687 F.Supp. 1310, 1316-17 (E.D. Ark. 1988); Buchanan v. City of Jackson, 683 F.Supp. 1515, 1527-28 (W.D. Tenn. 1988); Martin v. Allain, 658 F.Supp. 1183, 1193-94 (S.D. Miss. 1987); Jackson v. Edgefield County,

South Carolina Sch. Dist., 650 F.Supp. 1176, 1197 (D. S.C. 1986).

### 3. The District Court Correctly Considered Election Data Drawn Solely From Gretna Precincts.

Petitioners insinuate that the Fifth Circuit was "searching on the horizon for evidence of racial polarization." Pet. for Cert. 20. In fact, both of the courts below directly followed this Court's mandate that, where electoral data are sparse, "courts must rely on other factors that tend to prove unequal access to the electoral process." Gingles, 478 U.S. at 57 n.25.

This Court recognized that in some jurisdictions -- such as Gretna -- the evidence of voter polarization needed to establish a §2 violation might be extremely difficult, if not impossible, to gather. Historical discrimination generates a sad legacy of lingering,

current effects upon members of minority groups. Jurisdictions (such as Gretna) which have a history of discrimination may hold little in terms of valid statistical data from which to glean the existence of racial bloc voting.

The depressed socioeconomic status of minority group members deters candidates from undertaking expensive campaigns, especially in large election districts, as existed in Gretna prior to this suit. Furthermore, an exclusionary slating system, also found to exist in Gretna by the District Court, see 636 F.Supp. at 1134, greatly exacerbates this situation.

Under these circumstances, analyzing the electoral behavior of Gretna voters in elections to other offices was also necessary as a supplement to the analysis of the 1973, 1977, and 1979

elections to the Gretna Board of Aldermen. Therefore, the Fifth Circuit correctly allowed evidence of "exogenous"[12] elections to be used to assist in determining if voter polarization existed in Gretna.[13] Such an approach clearly falls within the "flexible" approach mandated by this Court. Gingles, 478 U.S. at 46. The same approach has consistently been utilized by those

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12. The choice of the word "exogenous" to describe these elections is somewhat unfortunate, because it might imply that the vote of voters from outside the challenged system were analyzed. A better terminology would be "indigenous." See BLACK'S LAW DICTIONARY 695 (5th ed. 1979) ("Indigena: . . . one born within the realm, or naturalized by act of parliament."). Of course, all election precincts analyzed by Plaintiffs' experts were "indigenous" in these terms, as only the votes of Gretna voters were considered.

13. Despite Defendants' current, adamant rejection of "exogenous" election data, their expert's testimony also relied on his inquiries into the votes of Gretna voters in city, parish, state, and federal elections. (TR3: 84/17, 95/18, 100/12, 128/16-18, & 134/8).

courts which have confronted the issue. See Campos, 840 F.2d at 1245; Buckanaga, 804 F.2d at 471, 476. See also Windy Boy v. County of Big Horn, 647 F.Supp. 1002, 1011, 1013 (D. Mont. 1986); Major v. Treen, 524 F.Supp. 325, 337-39 (E.D. La. 1983) (three-judge court); Bolden v. City of Mobile, 542 F.Supp. 1050, 1076-77 (S.D. Ala. 1982) (on remand).

Ignoring the great weight of these precedents, Petitioners claim that "a jurisdiction cannot be subject to corruption of blood by the presumed presence of Section 2 violations in neighboring jurisdictions." Pet. for Cert. 20. This rather odd claim ignores that the 1982 Amendments, of course, removed any notion of purposeful discrimination. See, e.g., S. Rep. 17-19, 33-34. Hence, the City of Gretna is not being blamed

for the existence of racial polarization among Gretna's residents. Petitioners' claim also suggests that voting by neighboring jurisdictions has been considered in this case. Of course, it has not. Only the votes of Gretna voters were analyzed. The use of election data in which voters from a particular jurisdiction have voted, even if the election is not for an office exclusively under the challenged electoral structure, is reasonable and, in many cases, necessary.

The use of such data is probative when the aim is to determine the voting patterns within that particular jurisdiction, i.e., whether those voters vote in racial terms. If data are available on an election, even one for an office whose scope is beyond the challenged system, the validity of the results is

not compromised, provided they do not include analysis of the voting patterns of voters outside the challenged jurisdiction.

This is especially appropriate given the agreement by Plaintiffs' and Defendants' experts that racial polarization occurs across the whole range of elections. At trial, Dr. Wildgen admitted that racial polarization is a pervasive phenomenon and should appear in all kinds of elections. (TR3: 84/24).

Petitioners seek solace in White v. Regester, 412 U.S. 755, 770 , 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), which mandates an appraisal of the "past and present reality, political and otherwise." As detailed in Part I.A., above, the District Court here did exactly that when it found: "[t]he historical record of discrimination in the State of

Louisiana and the Parish of Jefferson is undeniably clear and the record suggests it has not ended even now." Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113, 1116 (E.D. La. 1986).

This record of "past reality" has evolved into a "present reality" which, until the judgment in this case, included no blacks ever being elected as aldermen, an at-large electoral system with a majority vote requirement, very few minority candidates, and a racially exclusionary slating process. The number of aldermanic elections available for analysis inevitably has been reduced by the past and present reality in Gretna. Gingles specifically noted: "the fact that statistics from only one or a few elections are available does not foreclose a vote dilution claim." 478 U.S. at 57 n.25.

This Court has stressed a flexibility which dictates the use of "exogenous" election results to assist in making voter polarization analyses. Petitioners, on the other hand, would interpret Gingles so rigidly "that the inability of Gretna's blacks to participate as aldermanic candidates would also function to deprive them of relief under §2." Gretna, 834 F.2d at 502-03.

**III. There Is No Conflict Among The Courts Of Appeals Regarding Any Relevant Issue Involved In This Case.**

Petitioners next attempt to conjure from thin air a conflict among the Courts of Appeals by misreading (and quoting out of context) a single sentence from Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 108 S.Ct. 1111 (1988). In Carrollton, the Eleventh Circuit rejected defendants' attempts to

extrapolate the behavior of a county's voters from the behavior of a small municipality's electorate. In fact, that court simply refused to condone the use of municipal elections in which many of the voters in the challenged jurisdiction could not vote.

In the instant case, by contrast, Plaintiffs analyzed elections in which all voters in Gretna -- the challenged jurisdiction -- could vote. The election results analyzed in this case consisted exclusively of Gretna precincts, and, therefore, solely of residents of the challenged jurisdiction. No election results from precincts outside of Gretna were analyzed. Plaintiffs were not examining data on Gretna voters to prove a §2 violation in Jefferson Parish or the State of Louisiana. Plaintiffs proved racially polarized voting among

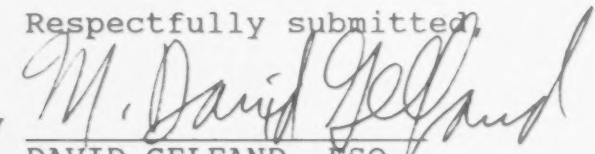
the City of Gretna's citizens by examining data on the City of Gretna's citizens. Indeed, Carrollton itself examined a similar election -- the 1984 Presidential primary. See 829 F.2d at 1556.

**CONCLUSION**

Petitioners have failed to show that the review they seek on certiorari is anything more than just "another hearing," Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1923), and their arguments reflect a poor appreciation of this Court's awesome responsibility. See Ross v. Moffitt, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (discretionary review depends on factors other than losing party's perception of judgment).

Respondents respectfully urge this Court to deny the Petition, as it raises no significant issue worthy of this Court's attention, and it presents no conflict among the Courts of Appeals.

Respectfully submitted,

By 

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NO. 88-597

# In the Supreme Court of the United States

OCTOBER TERM, 1988

City of Gretna, Louisiana, *et. al*,
Petitioners

versus

Citizens for a Better Gretna, *et.al*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**REPLY BRIEF on Behalf of Petitioners**

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Contents | i |
| Table of Authorities | ii |
| Background | 1 |
| Argument | 2 |
| 1. Majority Voting Patterns | 2 |
| 2. The *Gretna* "Intent Standard" | 4 |
| 3. The Burden of Proof Shifted to Defendants | 4 |
| 4. Black Candidates are Automatically "Black Preferred" | 5 |
| 5. Exogenous Elections | 6 |
| Conclusion | 8 |

## TABLE OF AUTHORITIES


**CASES** **Page**

*Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (1987), *cert. den.* 108 S.Ct. 111 (1988) ..... 8

*Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113 (E.D.La. 1986) ..... *passim*

*Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987) ..... *passim*

*McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988) ..... 4

*Thornburg v. Gingles*, 106 S.Ct. 2752 (1986)*passim*

STATUTES

United States Constitution ..... 1

Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973 ..... *passim*

MISCELLANEOUS

*The Federalist Papers* ..... 7,8

Engstrom and McDonald, "Definitions, Measurment, and Statistics: Weeding Wildgen's Thicket," 20 *Urban Lawyer* 181.

Wildgen, "Adding Thurnburg To The Thicket", 20 *Urban Lawyer* 162.

## MAY IT PLEASE THE COURT

Petitioners, the City of Gretna, et al., present for consideration the following in reply to the brief of the Respondents, Citizens for a Better Gretna, et. al..

## BACKGROUND

In their brief in opposition, Respondents portray *Gretna* as just another vote dilution case. They attempt to hide errors of law behind Rule 52(a) of the Federal Rules of Civil Procedure. The issues here are not of facts, but of law. The Supreme Court needs to clarify some issues unresolved in *Thornburg v. Gingles*, especially matters pertaining to the race of candidates.

The City of Gretna has been held to three incorrect and non-existent legal standards: a reincaration of the "intent standard", a race-of-the-candidate litmus test, and a rule of evidence that allows exogenous elections to be introduced as evidence whenever the "intensely local" examination of facts fails to pass the thresholds established by the Supreme Court.

The City of Gretna argues that the appropriate legal standards that need to be applied are found in *Thornburg v. Gingles*, in which there is neither an "intent standard" for judging the *bona fides* of candidates of the white race, nor a race-of-the-candidate litmus test for determining "preferred candidate" status, nor authorization to seek evidence of legally significant racial polarization from surrounding jurisdictions or other branches of government.[1]

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[1] To do so violates Arts I, II, and III of the Constitution.

*Thornburg* establishes threshold criteria for a finding of vote dilution. The threshold criteria at issue here are two. Petitioners maintain that the Voting Rights Act protects **voters**. Respondents insist that the Voting Rights Act is a "Candidate Protection Act". Petitioners further maintain that the "preferred candidate" of a bloc of voters may be of any race; the test is voter behavior, not skin color. Respondents maintain that only blacks can be considered minority preferred candidates.

Finally, **Thornburg** requires an "intensely local" examination of the "interaction" between local politics and the challenged mechanism. If this evidence fails to show legally significant racial polarization and a pattern of "usual loss" by minority preferred candidates, which was not shown in Gretna, plaintiffs may not roam afield to confect evidence from other jurisdictions or other branches of government.

## ARGUMENT

1. *Majority Voting Patterns*

Petitioners have argued, following *Thornburg v. Gingles*, 106 S.Ct. 2752 (1986), that the linchpin of a Section 2 claim is **legally significant** racial polarization — instances in which an electoral mechanism creates a pattern of usual loss for candidates preferred by a compact and cohesive minority. This task must rely on objective factors, including "discrete inquiries into minority and white voting practices." [*Thornburg* at 2796]

Respondents dissent from *Thornburg;* they claim that "it is inappropriate to focus solely upon minority

political cohesion and the motivations behind minority support for candidates."[2] Instead, the analysis should turn upon an inquiry into the majority's voting patterns." [*Brief in Opposition* pp. 33-34.] Respondents advocate, as did the district court, an erroneous focus on white voter behavior in lieu of the "discrete"behavioral analysis of both groups as mandated by the Supreme Court. As the trial court put matters, the "linchpin" of racial polarization is the "unwillingness of a substantial number of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests."[3] This is not consistent with *Thornburg.*

The motivation behind this line of argument is a transparent attempt to get the Supreme Court to retrofit present law — to turn a key threshold factor in *Thornburg,* minority cohesion, into a lever and fulcrum for proportional representation. What is being advanced here is the notion that a black candidate unpopular with whites is entitled to a mechanism assuring election,without regard to the black electorate's view of the matter. That is, the district court and respondents would shift the focus of a Section 2 inquiry from a discrete analysis of majority and minority voting patters into a juxtaposition of majority voters and a candidate of the black race. This is not consistent with *Thornburg.*

There is, as well, no more assured formula for creating racial polarization where none may exist. Respondents would have this Court erect a legal framework that makes the aggravation of racial tensions in

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[2] Petitioners do not assert that one should focus "solely" upon minority political cohesion; nor do petitioners speculate on "motivations behind minority support for candidates."

[3] *Opinion,* p. 53, *Record,* Vol. 1, p. 202.

the self interest of candidates. All one must do is antagonize the majority; racial polarization becomes a self-fulfilling prophecy. This is a tool to bootstrap Section 2 violations in jurisdictions where none exist.[4]

2. *The Gretna Intent Standard* [5]

Another feature of the district court's version of racial polarization is the assertion that "Unless it can be shown that an election occurred in which a white candidate ran on issues strongly affecting the black community and with an open, positive and strong identification with the black community. . . .candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized."[6] Just what does this intent standard imply?

3. *The Burden of Proof Shifted to Defendants*

This legal standard, reincarnating the "intent standard" which the Amended Voting Rights Act rejected, is not only at odds with the Act and *Thornburg*, but also with the Constitution. It is unique in that it shifts the burden of proof to the defendants. It creates a legal presumption that the color of a politician's skin endows her/him with the status of preferred candidate. To overcome this court-imposed racial prejudice established in *Gretna*, candidates of the majority race would face an impossible burden of proof. After winning at the ballot box, such candidates,

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[4] Such bootstrapping was denounced in *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988).

[5] The instant case, at 834 F.2d 496 (5th Cir. 1987), 636 F.Supp., 1113 (E.D.La. 1986).

[6] *Opinion*, p. 53, *Record*, Vol. 1, p. 202.

under *Gretna*, would then be subject to the political double jeopardy of re-waging their election campaigns in courthouses. This means that courts, under the *Gretna* doctrine, would second-guess black voters who supported white candidates. It is, in effect, a form of competency hearing for black voters.

4. *Black Candidates Are Automatically "Black Preferred"*

The 5th Circuit amplified the race-of-candidate *Gretna* doctrine. In reviewing the statistical evidence of racial voting patterns in the City, the panel declined to confront the issue of bivariate ecological regression's less than reliable performance.[7] Instead of taking up the genuine problems — legal, logical, and mathematical — in this measurement scheme, the panel set measurement aside as a relevant objective factor. Instead it advanced the notion that a candidate becomes minority-preferred on the basis of his/her race.[8]

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[7] Plaintiffs' experts, four years after trial, could not agree on a single "bivariate ecological regression" estimate for one election in Gretna. They reported, on the same page, the following estimated pluralities for a single candidate: 70.8%, 70.5%, 65.7%, 65.4%, 64.8%, and 60.0%. Engstrom and McDonald, "Definitions, Measurement, and Statistics: Weeding Wildgen's Thicket," 20 *Urban Lawyer* 181. Using the formula for bivariate ecological regression found in standard treatises, another political scientist arrived at an estimate of 49.5%. Wildgen, "Adding Thornburg To The Thicket", 20 *Urban Lawyer* 162.

[8] The 5th Circuit in *Gretna*, at p. 503, states that, "We consider Jones to be an aldermanic candidate sponsored by Gretna's minority group, because he received a significant portion of the black vote, and *because he is black.*" The court denied preferred candidate status to two other candidates, who outpolled Jones among black voters, solely on the grounds that they were white. *Citizens for A Better Gretna, et. al. v. City of Gretna, et. al.* 834 F.2d 496 (1987). The overwhelming black support that these two white candidates received was not inevitable, as the 5th Circuit said, in light of the multitude of white candidates in the election in question.

What this means is that preferred candidate status, in *Thornburg* treated as a finding of fact, has become a conclusion of law in the 5th Circuit.

5. *Exogenous Elections*

Petitioners point to the findings of both courts below that there was insufficient evidence of legally signigicant racial polarization in Gretna. Two times, at worst, a "black preferred" candidate lost; two times "black preferred" candidates won.[9] This is not a matter of dispute, and that should have ended the matter. Respondents argue that, in the absence of sufficient "intensely local" data, they have the right to introduce what the 5th Circuit calls "exogenous elections," drawn from state or federal contests -- and from other branches of government. Petitioners maintain that this amounts to attainder by consanquinity; and it ignores federalism, separation of powers, and universally accepted rules of evidence[10].

The introduction of exogenous elections levies an impossible, and implausible, burden of proof on local governments. It insists that they defend themselves from the vicissitudes of presidential campaigns or state-level contests. The challenged mechanism here is an at-large electoral scheme for the board of aldermen of a small municipality. It strains credulity to confound the purely municipal spirit of local legislative politics with executive branch issues drawn from nationwide contests or with state or even parish issues.

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[9] *Gretna*, at pp. 502-503.

[10] It is axiomatic that irrelevant evidence cannot be afforded probative value. Petitioners reiterate that the *Thornburg* data base does not include exogenous elections.

The design of the Republic, since the abandonment of the Articles of Confederation, has been premised on notions of a "compound republic."[11] As Hamilton put matters, "It is a known fact in human nature that its affections are commonly weak in proportion to the distance of diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union."[12]

Simply put, issues and personalities vary from one level of government to another. Drawing an analogy from electoral politics in one office to another office is risky political science. If people voted alike from one contest to another, there would be either a Republican Senate or a Democratic President. The fact of the matter is that neither condition prevails. Consequently, where it emerges that "intensely local" examinations of voting patterns do not satisfy threshold criteria, it is contrary to fundamental rules of evidence and the notion of fair play[13] as well as good political science — to scavenge exogenous jurisdictions for convenient evidence. This notion is explicit in the Supreme Court's language in *Thornburg* at p. 2763:

> "In order to answer this question [whether the challenged mechanism deprives plaintiffs of an equal opportunity to participate in the political process and to elect candidates of their choice] a court must assess the impact of the contested

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[11] Hamilton, "Federalist No. 23", in Hamilton, Madison, Jay, *The Federalist Papers*, Clinton Rossiter, ed., (New York: Mentor, 1961), p. 155.

[12] *Ibid.*, Federalist No. 17, p. 119.

[13] There is also inherent here a violation of procedural due process.

> structure or practice on minority electoral opportunities on the basis of objective factors."

It is inescapable logic that there can be no interaction between a challenged mechanism (an at-large aldermanic system) and voting practices in elections involving offices other than those comprising the challenged mechanism. The 11th Circuit, in *Carrollton Branch of NAACP v. Stallings*[14] understands this, and it commented accordingly at p. 2558.[15] The Seventh Circuit agrees, as per *McNeil v. Springfield Park Dist.*, at page 944.[16]

## CONCLUSION

Petitioners have conclusively shown that **this is not just another voting rights dispute that can hide behind Rule 52(a)**, and that they are entitled to review on *certiorari* for the following reasons:

1. **Petitioners have been held to wrong legal standards**,first an intent standard which focuses on the imponderable state of mind of white candidates, and the race of candidates as the fundamental determining factors with regard to preferred status.

2. The lower courts erroneously rely on and afford probative value to exogenous elections, and thus distort the scope of evidence examined in *Thornburg*, and also ignore the Constitution. **There is clearly a conflict among the Fifth, Seventh and Eleventh Circuits regarding the probative value of exogenous elections.** This conflict should be

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[14] 829 F.2d 1547 (1987), *cert. den.* 108 S.Ct. 1111 (1988), cited in *Petition for Certiorari* at pp. 18, 20.

[15] See *Petition for Certiorari*, p. 17-18.

[16] Note 4, *supra*.

definitively resolved in conformity with the positions of the Seventh and Eleventh Circuits, as those courts adhere to the scope of evidence relied upon in *Thornburg*.

3. **There is a basic uncertainty among the circuits regarding the issue of race of the candidate** -- an uncertaintly that should be definitively decided in conformity with the colorblind spirit and letter of Section 2, as it pertains to preferred candidates, lest there be established a doctrine of pure proportional representation.[17]

Petitioners reiterate the request in their petition for certiorari and move this Court to grant their petition for the reasons previously set forth.

Respectfully submitted,

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[17] Voting rights plaintiffs have in weak cases such as *Gretna* chosen to ignore, for obvious reasons, the Dole amendment language of Section 2 of the Voting Rights Act which states: "That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C., Sec. 1973.

## CERTIFICATE OF SERVICE

I hereby certify that I have this ___ day of December, 1988, served two copies of the foregoing reply brief upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

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No. 88-597

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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CITY OF GRETNA LOUISIANA, ET AL., PETITIONERS

*v.*

CITIZENS FOR A BETTER GRETNA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether, in this vote dilution case brought under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the district court properly prohibited the practice of filling all positions on the Board of Aldermen of the City of Gretna, Louisiana, through at-large elections, where the evidence showed that black candidates supported by substantial numbers of black voters received almost no votes from white voters and hence could not be elected to the Board under the at-large system.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement | 1 |
| Discussion | 8 |
| Conclusion | 16 |


## TABLE OF AUTHORITIES


Cases:

*City of Carrollton Branch of the NAACP* v. *Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 108 S. Ct. 1111 (1988) ..... 14

*Smith* v. *Clinton*, 687 F. Supp. 1310 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988) ..... 14

*Solomon* v. *Liberty County*, 865 F.2d 1566 (11th Cir. 1988) ..... 14

*Thornburg* v. *Gingles*, 478 U.S. 30 (1986) ..... 5, 6, 7, 8, 9, 10, 11, 15

Statutes:

Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*:

§ 2, 42 U.S.C. 1973 ..... 2, 5, 6, 9, 13, 14

§ 2(b), 42 U.S.C. 1973(b) ..... 2

§ 5, 42 U.S.C. 1973c ..... 6

La. Rev. Stat. Ann. (West 1979 & Supp. 1989):

§ 18.482 ..... 2

§ 18.511 ..... 1

Miscellaneous:

H. Blalock, *Social Statistics* (Rev. 2d ed. 1979) ..... 11

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

### STATEMENT

1. The City of Gretna, located in Jefferson Parish, Louisiana, has a population of 20,615. Pet. App. A41. Approximately one quarter of the voting age population is black. PX 56, at 12. Before the district court's decision in this case, Gretna was governed by a five-member Board of Aldermen who were elected at-large. It was the largest city in the State to use an at-large system. *Id.* at A41. Voters could vote for five candidates in an election for the Board. "Single-shot" or "bullet" voting (*i.e.*, voting for fewer than five candidates) also was permitted. *Id.* at A42 n.27. To be elected, candidates had to obtain a "majority" under La. Rev. Stat. Ann. § 18:511 (West 1979 & Supp. 1989). Pet.

App. A41-A42.[1] No black person was ever elected to the Board of Aldermen under this system since Gretna's incorporation in 1913. *Id.* at A34.

The plaintiffs, eleven black voters in Gretna, challenged the at-large system of electing the Board of Aldermen. They alleged that it effectively denied blacks the opportunity to elect their own representatives to the Board even though blacks comprise a significant portion of the total population of the City, in violation, inter alia, of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Section 2(b) provides that the Act is violated where members of racial minorities "have less opportunity than other members of the electorate * * * to elect representatives of their choice."

2. After trial, the district court ruled that Gretna's at-large system of electing the Board of Aldermen violates Section 2 of the Voting Rights Act. The court found that, since 1877, the white majority in Louisiana has resisted attempts by blacks to participate in the political process. Pet. App. A25-A26. In the 1950s and 1960s, the Jefferson Parish registrar of voters required blacks, but not whites, "to state their age exactly in terms of number of years, months, and days, and to recite the preamble to the United States Constitution in order to register to vote." *Id.* at

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[1] Respondents' expert explained that a "majority" was calculated by taking the entire number of votes cast in an election, dividing by five (the number of seats), and then dividing by two and adding one. If fewer than five candidates received a majority (as was especially likely if there were a large number of serious candidates), those who obtained a majority were declared elected and a runoff election was held in which no more than twice the number of candidates as there were unfilled positions could compete (see La. Rev. Stat. Ann. § 18:482 (West 1979). If more than five candidates received a majority (as was especially likely if there were few serious candidates), the five with the most votes won. II Tr. 77-78.

A26. "Schools in Jefferson Parish remained segregated until 1971," after which they were desegregated pursuant to a federal court order. *Id.* at A27. With respect to housing, the court found that "[v]irtually all residential neighborhoods are racially identifiable." *Id.* at A29.

The court further found that, while "blacks are registered to vote at a rate equivalent to white residents of Gretna," their turnout rate is substantially lower than that of white voters. Pet. App. A30. It suggested that blacks may believe that participation in local elections is futile because, for many years, there has been an informal slating process for city offices in Gretna from which blacks have been excluded. *Id.* at A31 & n.12. The slating process has been dominated by the chief of police and the mayor, whose supporters are known as "the Miller-White faction."[2] The candidates that the Miller-White faction endorses consistently win seats on the Board of Aldermen. *Id.* at A38-A41.

Only two blacks have ever run for city office in Gretna, Edwin Romain and Leo Jones. Both ran for alderman—Romain in 1973, and Jones in 1977 and 1979. Pet. App. A33. Romain sought the endorsement of several of the incumbent aldermen in 1973, but was told to talk to Chief of Police Miller. Miller, in turn, told him "that he could not be on the slate, that he was not needed to get the black vote." *Id.* at A40. Romain was the only non-incumbent candidate in 1973 who was not invited to a meeting held for the purpose of selecting candidates for the Miller-White faction to endorse for the two seats on the Board that were being vacated by incumbents. Two

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[2] Beauregard Miller, Sr., was chief of police from 1925 until 1976, when he was succeeded by his son, Beauregard, Jr. William White was the mayor of Gretna from 1951 until recently. Pet. App. A38.

candidates were endorsed by the Miller-White faction following the meeting, and they were elected. *Id.* at A39-A40.

Romain was supported by the Westside Citizens Committee, a black political organization. Pet. App. A40.[3] He campaigned in both the black and white communities. Romain, "a light-skinned black" (*id.* at A56), testified that many of the voters did not initially know that he was black. In the first round, he finished sixth in a field of 17 candidates. Between the first round and the runoff, a newspaper article noted that Romain might become the City's first black alderman. *Id.* at A56-A57. "The evidence suggests," the district court found, that the revelation that Romain is black "had severe consequences." *Id.* at A56. In the runoff election, Romain finished last in all but the two most heavily black precincts (where he came in first and second), and last in the total vote. *Id.* at A56-A57.

Leo Jones ran for one of five open seats in 1977, and for a single open seat in the 1979 special election. Unlike the 1973 election, data was available for the 1977 and 1979 elections with respect to turnout by race and precinct. The district court found that both of those races manifested high degrees of racially polarized voting. Respondents' expert calculated that, in 1977, Jones won approximately 67 percent of the black vote and, in 1979, 66 percent, but only 12 percent and one percent of the white vote in the same elections. Pet. App. A46.[4] The court concluded that the

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[3] The record reflects that the Westside Citizens Committee generally supported the Miller-White ticket. It made an exception and supported Romain in 1973, but it did not support Leo Jones either time he ran. I Tr. 168; III Tr. 33, 46, 48-54.

[4] Respondents' expert performed bivariate regression analyses of the election returns in the 1977 and 1979 elections, a statistical analysis that seeks to determine whether there is a direct and close relationship between race and voting behavior. The regression analyses showed

results in the 1977 and 1979 elections showed a high degree of racial polarization. *Id.* at A51.

Because there were so few races in which blacks had run for office in Gretna, the court also considered how Gretna's electorate had voted in two other races involving black candidates, and found extreme polarization in those races as well. In 1979, Ben Jeffers ran for Louisiana Secretary of State, and won about 70 percent of the black vote in Gretna but only about eight percent of the white vote. Pet. App. A46. Similarly, in Jesse Jackson's run in the 1984 Democratic presidential primary, he obtained 95 percent of the black vote in Gretna, but only two percent of the white vote. *Ibid.* Two other blacks had run in statewide elections for which data was available and drew little support from either blacks or whites. The court noted, however, that one of those candidates was a "fringe candidate," while the other withdrew before the election was held. *Id.* at A46-A47 n.31.

After reviewing the factors set forth in the Senate Report on the 1982 amendment of Section 2, the district court noted that "racially polarized voting will ordinarily

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that in both the 1977 and 1979 elections there was a very high correlation between the number of blacks in a precinct and the percentage of the votes for Jones. Pet. App. A50. The expert calculated the percentage of the blacks who voted for Jones by estimating, based on the existing data, what the vote would be in a hypothetical precinct that was 100 percent black. See Pet. App. A51 n.33; II Tr. 87-95.

An extreme case analysis corroborated the regression analysis. Three of Gretna's precincts have fewer than ten black voters. Analysis of the vote in these homogeneously white precincts showed that virtually no one in those precincts voted for Jones. Pet. App. A45, A52. Gretna has no homogenous black precincts.

These two techniques—bivariate regression analysis and extreme case analysis—were also used by the plaintiffs in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and provided the basis for the finding of a Section 2 violation that was affirmed by this Court.

be the keystone of a dilution case." Pet. App. A62. Given its findings of fact, the district court then concluded that the use of the at-large system should be prohibited under Section 2. Pet. App. A67. The court ordered the defendants to propose a new election plan, and subsequently authorized elections in which four aldermen are elected from single-member districts, and one is elected at-large. *Id.* at A17 n.20.[5] Leo Jones was elected to represent a predominantly black district in the first election held under that system. Br. in Opp. 20 n.4.

3. The court of appeals affirmed. Pet. App. A1-A17. From the language of the statute and this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the court of appeals concluded that "[a]t the heart of a § 2 vote dilution claim lies the issue of whether minorities have an equal opportunity to elect their candidates of choice." Pet. App. A3. "Racial bloc voting," the court further concluded, "is the linchpin of a § 2 vote dilution claim." *Id.* at A7. The court of appeals held that the district court had not erred in finding strong evidence of racial bloc voting. *Id.* at A17.

Petitioners attacked the district court's findings by offering a factual argument based upon calculations not presented to the district court that were set forth for the first time in a lengthy appendix to their brief in the court of appeals. Petitioners urged that the district court had erred in finding that blacks could not elect candidates of their choice because, they argued, Jones never was the black voters' preferred candidate. On the contrary, they claimed, he received only 49 percent of the votes of black voters in 1979, and, in 1977, two white candidates outpolled him among blacks. They further argued (Pet. C.A.

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[5] This plan was precleared by the Attorney General under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

Br. 30) that in 1981, when none of the candidates was black, four of the five winners received biracial support and only one was elected without substantial black support. See Pet. App. A12.

The court of appeals first held, contrary to petitioners' new factual allegations, that the district court's findings were not clearly erroneous. Pet. App. A7. In addition, the court concluded that even if petitioners' new factual allegations were correct, that would not undermine the district court's finding of racial bloc voting. If Jones had obtained 49 percent of the black vote in the 1979 special election rather than the 66 percent the plaintiffs claimed, the court explained, that would still be a sufficiently significant proportion of the black vote to qualify Jones as the preferred candidate of the black voters. *Id.* at A12. The court noted that, according to petitioners' new analysis, no white candidate in the eight-way race for one seat received more than 15 percent of the black vote. Thus, even under petitioners' figures Jones received three times more support among black voters than any other candidate. In addition, according to petitioners' new figures, Jones received only 1.5 percent of the white vote. *Id.* at A12 n.12.

As for the 1977 and 1981 elections, the court of appeals concluded that since five seats were at issue and there was only one black candidate in 1977 and none in 1981, "it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters." Pet. App. A13. More significant, the court found, was that the black candidate lost in 1977, even though he received 67 percent of the black vote, because very few whites voted for him. *Ibid.* Moreover, the court held, it was proper for the district court to focus, in its analysis of racially polarized voting, upon those elections in which there was a black candidate. *Id.* at A15-A17. The court noted that in *Gingles* this Court upheld a finding of racial

bloc voting based on analysis of elections in which blacks ran for office. *Id.* at A17.

Finally, the court of appeals addressed petitioner's claim that the district court erred in considering the non-aldermanic elections involving Jeffers and Jackson. The court held that, while such so-called "exogenous" elections could not, alone, make a case of racial bloc voting as to elections for Gretna's Board of Aldermen, "the district court properly considered them as additional evidence of bloc voting—particularly in light of the sparsity of available data." Pet. App. A13.

## DISCUSSION

This case involves a straightforward application of Section 2 of the Voting Rights Act and this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).[6] The courts below correctly applied established law to the facts of the case, and there is no conflict between the decision below and the decision of any other court of appeals. Petitioners' arguments—that the courts erred in finding Leo Jones to be the blacks' preferred candidate and by considering the elections in which Ben Jeffers ran for statewide office and Jesse Jackson ran for president—are based principally on factual allegations that were never brought to the attention

[6] In *Gingles*, this Court held that there are three preconditions to a finding that a multimember electoral district operates to impair minority voters' ability to elect representatives of their choice: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * *—usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

of the district court and were not accepted by the court of appeals. Accordingly, further review is not warranted.

1. The district court found racially polarized bloc voting on the basis of five elections, including three elections for the Board of Aldermen. The district court analyzed each of those three cases (1973, 1977, 1979) in detail, and found that black candidates Romain and Jones, who received a substantial proportion of the vote among blacks, were defeated by whites voting as a bloc. The court of appeals concluded that the district court's findings were not clearly erroneous. That evidence is sufficient to meet the requirement of *Gingles* that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * *—usually to defeat the minority's preferred candidate." 478 U.S. at 51. Indeed, the evidence showed that whites never supported a black candidate for the Board of Aldermen—Romain finished last in all but the two most heavily black precincts in 1973 after the newspaper pointed out that he was black, and Jones received 12 percent and one percent of the white vote in 1977 and 1979—although they received substantial support from black voters.[7]

Ignoring the findings of the two courts below, petitioners present the case as if it were devoid of any elections in which whites, voting as a bloc, defeated the blacks' preferred candidate. Specifically, petitioners contend (see, *e.g.*, Pet. 21) that the courts below misconstrued Section 2 to protect black candidates, as such, regardless of whether they are the preferred candidates of black voters. Were

[7] Petitioners raise no challenge to the sufficiency of the evidence of vote dilution by offering nonracial "explanations of the reasons why white voters rejected minority candidates." *Gingles*, 478 U.S. at 100 (opinion of O'Connor, J.); see also *id.* at 83 (opinion of White, J.).

this the case we would agree that there had been error, since the Voting Rights Act is aimed at protecting minority voters rather than minority candidates. But no such question is in fact presented because petitioners' allegations are not consistent with the facts found below and are unsupported by the record.

The centerpiece of petitioners' argument is their claim that Leo Jones was never the preferred candidate of the black community and that, therefore, the 1977 and 1979 elections are not examples of racially polarized bloc voting. Petitioners do not dispute that Jones received virtually no support among white voters. They deny, however, that blacks supported Jones in sufficient numbers to support the finding of racially polarized voting. But the district court's contrary findings, which are subject to review under the clearly erroneous standard (*Gingles*, 478 U.S. at 79), are plainly correct.

The district court found that Jones had received about 67 percent of the black vote in 1977 (Pet. App. A46), and petitioners do not question that finding. The district court made no finding below regarding the proportion of black votes received by any white candidate, and the court of appeals declined to make its own finding on the basis of allegations made for the first time on appeal. *Id.* at A10. Petitioners nevertheless contend that Jones was not the preferred candidate of black voters in 1977 because, according to petitioners, two of the white candidates who *won* seats in that same election also received a majority—indeed, a large majority—of the black vote.[8]

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[8] Petitioners cite to nothing but their own brief in the court of appeals for the proposition that two white aldermanic candidates outpolled Jones among blacks in 1977. Pet. 10. To estimate the percentage of the black voters who voted for white candidates Le Boeuf and Bush, petitioners performed the same kind of regression analysis that

The court of appeals correctly found that factual allegation unavailing. Assuming that some of the white candidates in the 1977 election won with black support, that does not vitiate the fact that the black candidate lost because of racially polarized voting. As the court of appeals explained: "*Gingles* defines bloc voting as white majority bloc voting that defeats minority preferred candidates. * * * In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." Pet. App. A13. Thus, the 1977 election shows that while blacks in Gretna supported some white candidates, whites in Gretna refused then (and every other time a black ran) to support a black candidate who was widely supported by black voters. As the court below stated, that is evidence of racial bloc voting.

In the 1979 special election for a single seat on the Board of Aldermen, the district court found that Jones received

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respondents' expert had done with respect to Jones. As the scattergram in the appendix to their court of appeals brief (at A22) shows, however, there was almost no correlation between the percentage of black voters in a precinct and the vote for LeBoeuf or Bush. While it is theoretically possible to extrapolate to an intercept and estimate the percentage of blacks who voted for the white candidates in that circumstance, the result is unreliable. See H. Blalock, *Social Statistics* 396-397 (Rev. 2d ed. 1979).

about 66 percent of the vote among blacks but was again defeated because he received virtually no votes from whites. Once more, petitioners do not contend that Jones received the support of white voters, but they maintain that he was not the blacks' preferred candidate because he actually received only 49 percent of the votes of blacks who voted. The court of appeals did not overturn the district court's finding that Jones received 66 percent of the black vote, which is the correct figure.[9] In any event, even if Jones had received "only" 49 percent of the black vote in the eight-way race for one seat in 1979, he was plainly the heavy favorite of the black voters. By petitioners' own estimates, Jones received far more support among blacks than did any other candidate; the white candidate receiving the next highest proportion of the black vote (Weigel) received only 15 percent. Pet. App. A12 n.12.

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[9] Petitioners estimated the percentage of blacks who voted for Jones in 1979 by performing a bivariate regression analysis. They used, as one variable, the percentage of voters who voted for Jones in each precinct, just as the respondents had—but using different figures. See Appendix to Appellants' Brief in the Court of Appeals A6. For example, in Precinct 1-3, 620 persons turned out to vote (*ibid.*), but only 547 of them voted in the election for the Board of Aldermen. See PX 57. Jones received 234 of the 547 votes cast for alderman. Petitioners, however, calculated that Jones had won 234 out of *620* votes. Petitioners' calculation, in other words, credited Jones with a lower percentage of the total vote than he actually received in that (and every other) precinct. Not surprisingly, when petitioners extrapolated from these figures to find the percentage Jones would have received in an hypothetical all-black precinct, they came out with a depressed figure of 49 percent. That petitioners' estimate is faulty is illustrated by the fact that the sum of the black vote for all candidates as calculated by their method is only about 86 percent rather than 100 percent. See Pet. App. A12 n.12 (sum of "black preference" column).

Thus, the lower courts correctly concluded that the elections in which Jones ran, together with the evidence regarding the candidacies of Romain, Jeffers, and Jackson, offered sufficient evidence of racial bloc voting to support a finding of dilution. The lower courts also relied, of course, on a wide variety of other evidence in concluding that, under the totality of the circumstances, there was a Section 2 violation. See Pet. App. A7, A17, A22-A43, A55-A58, A64-A67. Petitioners' contention that the court of appeals' decision protects black candidates who are unsupported by black voters has no basis in either the opinions below or the record.[10]

2. There is also no merit in petitioners' contention that the district court was obliged to ignore the evidence of racially polarized bloc voting in the 1984 Democratic presidential primary and the 1979 election for Louisiana Secretary of State. To be sure, if blacks had succeeded in electing their preferred candidates to Gretna's Board of Aldermen, there would be no violation of Section 2 here even if whites voted as a bloc against black candidates for other offices. There is no reason to conclude, however, that an election which reflects the racial voting patterns of the constituency of the jurisdiction at issue—in this case, the City of Gretna—is irrelevant.[11] As the court of appeals

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[10] Petitioners purport to raise the broader question (see Questions Presented 6 and 8) whether respondents could prove racial bloc voting if the record reflected a pattern, in elections having only white candidates, of the black-supported candidates winning. Petitioners make no argument to this effect in the body of their petition. Nor could they. No evidence was presented to the district court, by either side, regarding black voting patterns in elections for the Board of Aldermen other than those in 1973, 1977, and 1979.

[11] Petitioners consistently refer to the 1984 Democratic presidential primary and the 1979 election of Louisiana Secretary of State as "exogenous" elections. See, *e.g.*, Pet. 20. Contrary to the suggestion that

said, while such "elections alone could not prove racially polarized voting in Gretna aldermanic elections," they may be "properly considered * * * as additional evidence of bloc voting." Pet. App. A13. Indeed, such elections have typically been considered in the analysis of racial bloc voting in Section 2 cases. See, *e.g.*, *Solomon* v. *Liberty County*, 865 F.2d 1566, 1575-1576 & n.15 (11th Cir. 1988); *City of Carrollton Branch of the NAACP* v. *Stallings*, 829 F.2d 1547, 1556 (11th Cir. 1987), cert. denied, 108 S. Ct. 1111 (1988); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1315 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988).

Contrary to petitioners' assertion (Pet. 17-18), there is no conflict between the lower courts' analysis of the Jeffers and Jackson races and the Eleventh Circuit's decision in *Carrollton*. In that case, the court of appeals held only that the district court did not err when it *omitted* two elections from its analysis of racial bloc voting as atypical. Specifically, the district court there had not considered a city election where the constituency was substantially smaller than the county commission election system under attack, and a statewide judicial election in which a black ran as an incumbent and won. 829 F.2d at 1558-1559. Nothing in the decision in *Carrollton* is inconsistent with the court's decision in the present case to consider other elections, featuring prominent black candidates, in which every Gretna precinct participated, and in which there was a clear pattern of racially polarized bloc voting. Indeed, the absence of a conflict is shown by the fact that the court of appeals in *Carrollton* approved the district court's consideration of the votes cast for Jackson in that jurisdiction in the 1984 Democratic primary. *Id.* at 1556.

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"exogenous" implies, voters in Gretna participated in those elections, and the only figures that were studied concerned how Gretna residents voted. No votes cast outside Gretna were analyzed.

Finally, there is no merit to petitioners' contradictory complaint (Pet. 16-17) that the district court erred by not considering in detail the statewide elections in which black candidates received little support from anyone. As the district court explained, one of those candidates withdrew before the election, so little could be learned from an analysis of the support that he received on election day despite his withdrawal. Pet. App. A46-A47 n.31. And in the case of the other candidate, described by the district court as a "fringe candidate" (*ibid.*), it could not be said that whites voting as a bloc did or did not defeat the choice of the black voters in the two elections in which he ran, since he was not the black voters' choice. The courts below properly decided that those elections were not relevant to determining whether "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. In arguing that those elections are relevant, petitioners make the very error they incorrectly accuse respondents of making—confusing candidates who are black with candidates who are supported by black voters.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

City of Gretna, Louisiana, *et. al*,
Petitioners

versus

Citizens for a Better Gretna, *et.al*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## SUPPLEMENTAL BRIEF on Behalf of Petitioners

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17 pp

## TABLE OF CONTENTS

Page

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Background . . . . . 1

Argument . . . . . 4

Problems of Law . . . . . 4

1. The Relevance of Candidate Race . . . . . 4

2. Exogenous Elections . . . . . 7

Problems of Fact . . . . . 8

1. Exogenous Elections . . . . . 8

2. Indigenous Elections . . . . . 9

Conclusion . . . . . 13

Certificate of Service . . . . . 14

## TABLE OF AUTHORITIES

CASES — Page

*Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (1987), *cert. den.* 108 S.Ct. 1111 (1988) ..... 9

*Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113 (E.D.La. 1986) ..... *passim*

*Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987) ..... *passim*

*Collins v. Norfolk* sl. op. CA-83-526-N, 4th Cir., Feb. 1988 ..... 9

*Overton v. City of Austin*, No. 87-1805 (5th Cir., May 1, 1989) ..... *passim*

*Richmond v. Croson Co.*, No. 87-998, U.S. S.Ct. (January 23, 1989) ..... 3

*Smith v. Clinton*, 687 F.Supp. 1310 (E.D. Ark.), aff'd, 109 S.Ct. 548 (1988) ..... 9

*Solomon v. Liberty Co.*, 865 F.2d 1566 (11th Cir. 1988) ..... 9

*Thornburg v. Gingles*, 106 S.Ct. 2752 (1986) ..... *passim*

STATUTES

United States Constitution ..... 15

Voting Rights Act of 1965, Sec. 2, as amended, 42 U.S.C.A. Sec. 1973 ..... *passim*

MISCELLANEOUS

Blalock, *Social Statistics* ..... 12

Engstrom and McDonald, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," 17 *Urban Lawyer* 3 (1985) .. 10

Langbein & Lichtman, *Ecological Inference* ..... 10

Wildgen, "Adding *Thornburg* To The Thicket", 20 *Urban Lawyer 155* ..... 12

## MAY IT PLEASE THE COURT

Petitioners, the City of Gretna, et al., present for consideration the following supplemental brief, in conformity with Rule 35.5 and other applicable rules, and in response to the recent case of *Overton v. City of Austin*, No. 87-1805 (5th Cir., May 1, 1989), and the intervention of the Government as *amicus curiae*.

## BACKGROUND

Four and a half years after *Gretna* was tried, three years after the district court issued its decision, and a year and a half after the appeals court decision,[1] another Fifth Circuit panel wrote, "A most perplexing aspect of *Thornburg* is its discussion of what constitutes evidence of legally significant racially polarized voting."[2] Why, three years after *Thornburg v. Gingles*[3], are district and appellate courts still struggling with the definition of "legally significant racial polarization"?

*Gretna* brings the issues that perplex the Fifth Circuit, as well as others, into sharp relief, and provides an opportunity to grant the Fifth Circuit's explicit plea for "further Supreme Court guidance."[4]

Much of the explanation for the unique status of *Gretna* is linked to the peculiar timing of the litigation and the atypical treatment of the case after trial. The City of Gretna went to trial in January of 1985 -- about a year and

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[1] *Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113 (E.D.La. 1986), 834 F.2d 496 (5th Cir. 1987)

[2] *Overton v. City of Austin*, sl. op., p. 3327.

[3] Cited throughout prior briefs.

[4] Note 2, *supra*.

a half before *Thornburg* was decided. As such, the trial was held under *Zimmer-White* guidelines. The case languished under advisement for sixteen months. The district court issued its decision a few weeks before *Thornburg*, wherein this Court construed for the first time Section 2 of the Voting Rights Act of 1965, as amended in 1982.

It was readily apparent that the theory of vote dilution advanced by the lower courts in *Gretna* was at odds with the holdings of this Court in *Thornburg*. The *Gretna* theory of vote dilution was based on race-of-the-candidate-consciousness -- the notion that candidates of the black race are minority preferred candidates as a matter of law. An extra burden was placed on candidates of the white race who wanted to claim minority-preferred status. *Gretna* also expanded the scope of admissible evidence in vote dilution litigation by introducing exogenous elections -- elections held in overlapping jurisdictions and jurisdictions for other branches of government. RELIANCE ON SUCH ELECTIONS IS INCONSISTENT WITH THE FUNDAMENTAL NOTION OF FEDERALISM.[5]

The Fifth Circuit, rather than remanding *Gretna* for consideration under *Thornburg*, tried to rehabilitate the district court decision by confusing facts in North Carolina (the *Thornburg* situs) with the law as it applied to Gretna. To salvage the district court's race-conscious litmus test for minority-preferred status the 5th Circuit pointed to North Carolina and noted that all of the minority-preferred candidates in *Thornburg* were black. It advanced the theory that the Supreme Court had implicity established a color of candidate standard for evaluating election results. It dealt with the use of exogenous elections, notably absent in *Thornburg*, by arguing, that where evidence of

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[5]See petitioners' arguments at pp. 6-8 of their *Reply Brief*.

polarization is sparse, plaintiffs may search abroad for proof of polarization. On the other hand, where exogenous data did not support a contention of polarization, it could be ignored, argued the 5th Circuit, on the tenuous grounds of candidate non-viability. The pretext for this amorphous standard was flexibility. This kind of flexibility is fatally flawed by its contravention of the spirit of federalism, its lack of judicial manageability, and its variance from standards set by the Supreme Court in *Richmond v. Croson Co.*, No. 87-998, U.S. S.Ct. (January 23, 1989):

> "We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."[6]

The Government, as *amicus curiae,* has provided no guidance. Rather, it has compounded the problem by proposing a counterfeit standard by which to measure vote dilution. It inexplicably ignores the issues presented by *Thornburg* and subjects this case to a singular, useless focus: Is there a violation of Section 2 of the Voting Rights Act where black [race] candidates supported by substantial numbers of black voters lose, because they receive almost no votes from white voters?[7] This shallow focus ignores the *Thornburg* tests by, among other things, requiring that white voters must vote for black race candidates. Under the voting rights regime advocated by the Government, those who would exacerbate racial tensions are encouraged. All one need do to bootstrap a Section 2 violation is find a candidate who pursues a deliberate policy of alienating majority voters. This puts in place a mechanism that fuels the very evils the Voting Rights Act and related legislation tries to extinguish.

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[6]Sl. op., p. 30.

[7]Govt. Brief, p. I.

## ARGUMENT

### Problems of Law

1. The Relevance of Candidate Race

It is indisputable that legally significant racial polarization is the linchpin of a Section 2 claim. The importance of *Thornburg* lies in its search for judically manageable standards for evaluating polarization. The key managerial concepts are incorporated in the notion that legally significant racial polarization is demonstrated by the usual loss of minority preferred candidates due to contrary majority bloc voting. Two ways of demonstrating this are bivariate ecological regression and homogeneous precinct analysis.

The problem raised in Gretna, and one still unclear from *Thornburg*, is just who is a minority preferred candidate? In the plurality's view, race of candidate has no relevance at all. Five Justices agree that a candidate's race *may* be relevant. Nowhere, however, is it suggested in *Thornburg* that candidate race is an overriding concern. There is likewise no suggestion that minority-race candidates are deemed minority-preferred on the basis of their skin color. This is only logical. After all, if minority-preferred status were simply a matter of skin color, why would the Court countenance forays into the mathematical thicket of electoral statistics? There is no suggestion in *Thornburg* that white candidates bear a special burden of proof in establishing their minority-preferred status. Yet in *Gretna* such a standard was imposed on white candidates. That is, under *Gretna* rules, even after winning the minority vote (as demonstrated by statistics) they must also establish to a court's satisfaction that they "ran on issues strongly affecting the black community and with an open,

postive and strong identification with the black community". Otherwise, "candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized."[8]

This passage is notable for two things: its obvious racism and its lack of judicial manageability. After all, can a court second-guess an electorate as to "issues" or as to "open, positive, and strong identification"? The answer is obvious. But the consequences of the *Gretna* rule are clear: a racially antagonistic group can confect a Section 2 violation in a non-polarized community by deliberatly alienating the majority population. This turns Section 2 into a "Candidate Protection Act."

The Government's position on this matter is disingenous. The Government grants petitioner's claim that "the Voting Rights Act is aimed at protecting minority voters rather than minority candidates."[9] But it concludes that, "Assuming that some of the white candidates in the 1977 election won with black support, that does not vitiate the fact that the black candidate lost because of racially polarized voting."[10]

This is a clear departure from the *Thornburg* standard. Legally significant racial polarization depends on the "usual" loss by minority-preferred candidates -- not the occasional or ideosyncratic loss. Basically, the Government's

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[8] *Record*, Vol. 1, p. 202. The victorious (white) candidates did have an open committment to the black community. They were endorsed by the Westside Citizen's Committee, a black endorsement group. Jones (black candidate) was not. See Govt. Brief, p.4, n.3.

[9] Govt. Brief, p. 10.

[10] *Id.*, p. 11. Bivariate ecological regression shows that Jones lost the black vote.

position is that *all* minority-preferred candidates must win, or, alternatively, that only white minority-preferred candidates can lose. This is a backdoor plea for proportional representation.

The Government unjustly faults petitioners for "offering a factual argument based upon calculations not presented to the district court that was set forth for the first time in a lengthy appendix to their brief in the court of appeals."[11] The fact is that the raw numbers upon which petitioners base their calculations are in evidence via respondents' exhibits.[12] The calculations, not necessarily relevant pre-*Thornburg*, when this case was tried, are certainly relevant now. Petitioners' and respondents' trial strategies and the district court's decision were geared to the *Zimmer-White* guidelines, which, although not obsolete, do not provide the principal framework for evaluating a vote dilution claim.[13] THIS IS THE REASON FOR REMAND.[14]

Petitioners have consistently argued that, under *Thornburg*, the ultimate questions are: (1) to what extent does a compact and cohesive minority group usually see its preferred candidates defeated by a majority bloc? (2) how badly or how well are Gretna's black *voters* (not Gretna's black *candidates*) faring under Gretna's at-large system? The Government ignores these questions. The case needs to be remanded so that its facts can be re-examined in the

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[11] Govt. Brief, p. 6.

[12] Plaintiffs' exhibits 67, 68.

[13] See *Thornburg* at 2765-2766.

[14] It is axiomatic that an appellate court can and should remand and grant accompanying appropriate relief where alleged error in the lower court was due to judicial rulings which, subsequent to trial, were rendered obsolete or were materially affected by a subsequent case (e.g. *Thornburg v. Gingles*), which, had it been known, might have changed the result reached in the lower court.

light of the legitimate issues, as *Thornburg* presents them, and as this Court might choose to refine them here.

2. Exogenous Elections

Respondents[15], the district court, and the 5th Circuit recognized that evidence of polarization based on City of Gretna elections was insufficient on its own to sustain a Section 2 claim. There was no evidence that Edwin Romaine had lost because of racial polarization. Indeed, Romaine testified that his candidacy was not needed to win the black vote. The incumbents were already receiving it.[16] Leo Jones, who ran unsuccessfully in a regular election and in a special election, was outpolled among black voters by two experienced white incumbents in the regular election and failed to win a majority of the black vote in the special election.[17]

As a result, respondents turned to a statewide and a presidential election to buttress their claims. These kinds of elections are called exogenous (generated from the outside) elections. Resort to exogenous elections is tempting but treacherous. In the case of Gretna, plaintiffs had to sweep into footnotes exogenous elections showing no polarization.

The reason resort to exogenous elections is so tempting is that there is no jurisdiction in the nation that can escape

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15 "Respondents" and "plaintiffs" are used interchangeably.

16 *Opinion*, p. 45, *Record*, Vol 1, p. 194. See also Appellants' *Original Brief* - 5th Cir., pp. 14-15. Romaine and Leo Jones were black candidates.

17 The raw data relating to these elections are contained in Plaintiffs' Ex. 67-68. The factual arguments relating to these data, as stated earlier, are relevant post-*Thornburg*, and petitioners should, on remand, be allowed to develop them.

attainder under this procedure, if one chooses the right election. For example, most American municipalities with an at-large system could be attacked on the basis of Jesse Jackson's campaigns for President. On the other hand, it is also usually possible to search electoral archives for other elections reflecting no polarization. Essentially the search is limitless, unmanageable, unscientific, and, most importantly, **inconsistent with the notion of federalism.** This is recognized in *Thornburg* and is inexplicably ignored by the Government. *Thornburg* (at 2763, 2765) places great emphasis on plaintiffs' duty to establish a casual link between a jurisdiction's political reality and the challenged mechanism or electoral practice.

The Government ignores this fundamental evidentiary standard. There is no great mystery surrounding it. It is patently based on relevance and is in keeping with the Court's attachment to an "intensely local apprasial of the design and impact of the multimember district in the light of past and present reality, political and otherwise" (2781), which appraisal is ultimately based on federalism.

## Problems of Fact

### 1. Exogenous Elections

The Government and the court of appeals agree that "[exogenous] elections alone [cannot] prove racially polarized voting in Gretna aldermanic elections," but they may be "properly considered. . . .as additional evidence of bloc voting."[18] The Government further notes that "such elections have typically been considered in the analysis of

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[18] Govt. Brief, pp. 13-14.

racial bloc voting in Section 2 cases."[19] What the Government does not point out is that these are post-*Thornburg* cases, in which the litigants and the courts had the opportunity to view exogenous elections in the light of the methodological and legal rules adopted in *Thornburg*. Petitioners have had no such opportunity. The Government is attempting to use these cases to foreclose reconsideration in the instant case. On the contrary, they are compelling arguments in favor of remand, assuming, *arguendo*, that the Government's views have merit. This Court must determine whether exogenous elections are admissible. If it determines that they are admissible, it must, via remand, afford petitioners the opportunity to prepare and present their case accordingly, and allow the lower courts to weight these elections in the light of *Thornburg* principles. If the Court finds that exogenous elections are inadmissible, the parties must focus on Gretna aldermanic elections alone. Petitioners reiterate that the latter finding would be consistent with the intensely local standard set forth in *Thornburg* and with federalism.

2. Indigenous Elections

Bivariate ecological regression and homogeneous precenct analysis (extreme case analysis) are two complementary statistical methods used by courts for estimating differences in voting behavior between groups of voters. Courts also are becoming increasingly conscious of the limitations of these methods. (*Collins v. Norfolk*, sl. op. CA-83-526-N, 4th Cir., Feb. 1988, p. 32). As the 5th Circuit recently wrote:

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[19] *Id.*, p. 14. Citing *Solomon v. Liberty Co.*, 865 F.2d 1566 (11th Cir. 1988); *City of Carrollton Branch NAACP v. Stallings*, 829 F.2d 1547, *cert. den.*, 108 S.Ct. 1111 (1988); and *Smith v. Clinton*, 687 F.Supp. 1310 (E.D. Ark.), aff'd, 109 S.Ct. 548 (1988).

> Briefly stated, [bivariate ecological regression] premises correlations not upon facts about individual voter behavior but upon assumptions usually developed from precinct election returns. Estimating the ethnic composition of precincts, the analyst then *assumes* that the voters in most precincts voted according to their ethnicity. The piling on of assumptions may easily fall pray to more sophisticated statistical errors. (*Overton v. Austin*, sl. op. No. 87-1805, 5th Cir., May 1989, p. 3328).

Homogeneous precinct analysis is impossible in Gretna. There are homogeneous white precincts, but no homogeneous black precincts. This is an obvious problem, because:

> Homogeneous precinct analysis is straightforward and easy to understand. The analyst isolates two groups of "homogeneous" precincts: those in which almost all potential voters are black and those in which proportionately few are black. Precincts are considered to be homogeneous if over 90 percent of the population, voting age population, or registered voters (depending on which data are available) residing in the precinct are members of the minority group; or conversely, less than 10 percent are members of the minority group.[20]

Gretna, with no homogeneous black precincts, is unsuitable for this mode of statistical analysis. The Government is aware of this fact; its own brief states, "Gretna has

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[20] Engstrom and McDonald, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," 17 *Urban Lawyer* 3 (1985), 371.

no homogeneous precincts." Yet it believes that "an extreme cases analysis corroborated the regression analysis."[21]

The Government's misconstruction of homogeneous precinct analysis exposes a lack of methodological sophistication that sets the stage for egregious errors in interpreting the somewhat more complicated issue of "bivariate ecological regression." The technique is explained in intermediate level statistics texts.[22] It has a formula that requires nothing more than the mechanical entry of data and subsequent computation. It results in estimates of white and black pluralities for a candidate of interest. Plaintiffs' experts used an *ad-hoc* formula of their own confection to inflate the degree of polarization. The Government should not have placed such blind faith in plaintiffs' ideosyncratic and unscientific methodology. Courts are already aware of the great opportunity for self-serving mathematical chicanery with bivariate ecological regression. Many of the problems have been outlined by petitioners' expert, whose work in this area has been favorably cited by the 5th Circuit in *Overton v. Austin* at p. 3328, sl. op.

It also bears pointing out that the use of regression statistics, harnessed to an undue fixation on candidate race, creates a multivariate context by making candidate race a factor in vote dilution studies. Multivariate analysis is clearly antithetical to the methodology sanctioned by *Thornburg*. It is nothing more than a mathematical version of the discredited "intent" standard, and a tool to introduce proportional representation for its own sake.

The fact is that Gretna's political geography makes

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[21] Govt. Brief, p. 5, n. 4.

it an unlikely place to conduct successful statistical forays using ecological methods. Plaintiffs' experts had to engage in what even the Government recognizes as a hazardous and unreliable practice: linear extrapolation.[23] Linear extrapolation is frowned upon by the scientific literature, as petitioners have repeatedly warned. The Government is aware that extrapolation is a problem, but thinks it creates a difficulty only when petitioners extrapolate.[24] This is far from the case.

Petitioners, using standard rather than *ad-hoc* statistical methodology,[25] have demonstrated that minority-preferred candidates do not usually lose in Gretna aldermanic elections. It is only through the selective exclusion (white candidates) and inclusion (exogenous elections) of evidence that the Government can make out a case for racial polarization. Unmasked, the basis for this evidence-shopping emerges as artificial and unrelated to the Voting Rights Act. Instead, it serves the agenda of a fictitious "Minority Candidate Set-Aside Act," an illicit entitlement program.

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[22] Langbein & Lichtman, *Ecological Inference*, p. 53.

[23] Govt. Brief, p. 11, n. 8.

[24] *Id.* The Government is convinced that extrapolation is unreliable in instances of low correlation (i.e. instances of non-polarization). It cites Blalock's *Social Statistics* as an authority. Blalock is an authority, but the Government misconstrues his point. Problems with extrapolation are not dependent on correlation (r). They arise because the nature (shape) of the relationship may change outside of the range of available data. The Government cites the wrong passage. The relevant argument is developed in Blalock, *Social Statistics* (Rev. 2d ed. 1979) at 402-403. The danger of applying extrapolation in vote dilution cases is addressed in Wildgen, "Adding *Thornburg* To The Thicket," 20 *Uban Lawyer* 155.

[25] No court has challenged petitioners' methodology.

## CONCLUSION

Petitioners reiterate that *this is not just another voting rights dispute that can be disposed of via Rule 52(a).*

The Government has compounded the errors of the lower courts by failing to address the appropriate issues. It inexplicably ignores the 5th Circuit's plea in *Overton v. Austin* for further guidance, and it fails to acknowledge that *Gretna* affords this Court the opportunity to refine *Thornburg* and thus create a judicially manageable standard of review for vote dilution cases, consistent with the fundamental concept of federalism and Articles I, II, and III of the Constitution, which are violated if (1) an intent standard is imposed to judge the motives of white candidates; (2) a race-of-the-candidate litmus test is used to determine preferred candidate status; or (3) exogenous elections are examined to seek evidence of legally significant racial polarization.

Petitioners reiterate their request for certiorari and move this Court to grant their petition for those reasons herein and previosly set forth.

Respectfully submitted,

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